
State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS
AFTER REMAND

RICHARD ADAM KREINER,

Plaintiff-Appellee,

Supreme Court No. 124120

v

ROBERT OAKLAND FISCHER,

Defendant-Appellant.

Court of Appeals No: 225640
Lapeer County Circuit Court No: 98-026072 NI



**AMICUS CURIAE, AUTO CLUB INSURANCE ASSOCIATION'S
BRIEF ON APPEAL**

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STATEMENT OF INTEREST
AND PROPOSED RULES OF LAW

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION (ACIA), is a reciprocal automobile inter-insurance exchange organized under MCL 500.7200 et seq, to sell motor vehicle insurance in Michigan. ACIA issues approximately 25% of the motor vehicle policies in this state, making it the largest single insurer.

The dispositive issue in this appeal is how the underlined portion of §3135(7) of the No-Fault Act should be interpreted and applied:

". . . '[S]erious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

MCL 500.3135(7) (emphasis added). ACIA (like all motor vehicle insurers doing business in Michigan) has a substantial interest in how this issue is decided.

All motor vehicle policies issued in Michigan must include residual liability insurance to cover the tort liability retained by §3135 of the No-Fault Act. MCL 500.3131(1) & .3135. That liability includes noneconomic damages for persons who sustain a serious impairment of body function as a result of a motor vehicle accident. MCL 500.3135(1). The minimum required amount of residual bodily injury liability insurance is \$20,000 per person, and \$40,000 per accident. MCL 500.3009(1) & .3131(1). The "serious impairment" threshold also applies when the injured person seeks optional, uninsured or underinsured motorist benefits under his/her motor vehicle policy. Auto Club Ins Ass'n v Hill, 431 Mich 449; 430 NW2d 636 (1988).

To date, the Court of Appeals has issued nearly 100 opinions involving the 1995 definition of "serious impairment of body function" in §3135(7). Most of those opinions discuss whether the accident injuries affected the plaintiff's general ability to lead his/her

normal life. (See Appendix A). Since the existence of a "serious impairment" is a question of law for the courts in many cases, MCL 500.3135(2)(a), this will be a recurring issue.

This case (and Straub v Collette, Supreme Court No. 124757) offer an excellent opportunity for this Court to provide specific guidance to the bench, bar and litigants on a key issue. Pursuant to MCR 7.306(C), ACIA requests permission to participate as an amicus curiae to offer its views as to how §3135(7) should be interpreted and applied.

Based on the language of §3135(7), the Legislature's stated intent in enacting this provision, and over three decades of "serious impairment" case law, ACIA respectfully requests this Court to adopt the following rules of law.

First, the Legislature intended to re-establish the "serious impairment" threshold as a significant obstacle to recovery of noneconomic damages akin to the other threshold requirements imposed by MCL 500.3135(1) -- death and permanent serious disfigurement. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.

Second, the requirement that an impairment be objectively manifested, and affect an important body function, reflect a return to the standards imposed by Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982). However, unlike Cassidy, the Legislature required an evaluation of the effect of an injury on the plaintiff's general ability to lead his or her normal life. That inquiry requires a comparison of the plaintiff's lifestyle before and after the accident, rather than comparisons with a hypothetical person's life.

Third, per Kreiner v Fischer, 468 Mich 884; 661 NW2d 234 (2003), "any" effect on the plaintiff's life is insufficient to satisfy §3135(7). Conversely, a "serious" effect is not required. Instead, the effect must be on the plaintiff's "general" ability to lead his or her normal life.

The word "general" requires an analysis of all aspects of the plaintiff's pre- and post-accident functional abilities and activities, as well as their significance in the plaintiff's life. Minor changes in how a person performs a specific activity do not alter the fact that the person is still "generally" able to perform that activity.

Fourth, §3135(7) also requires that the plaintiff's "ability" to lead his or her normal life be affected. The word "ability" requires an objective analysis of the plaintiff's actual capabilities and capacities.

Fifth, the following non-exhaustive list of objective factors should be considered in evaluating the plaintiff's "ability" to lead his or her pre-accident life -- the nature and extent of the impairment; the type and length of treatment required; the duration of the impairment; the extent of any residual impairment; and the prognosis for eventual recovery. An impairment need not be permanent to be "serious". However, a permanent impairment is not necessarily "serious".

Minor residual impairments may require some changes in how the plaintiff performs an activity, but such accommodations often do not affect the plaintiff's overall "ability" to perform that activity. Conversely, a significant residual impairment may result in the plaintiff abandoning a significant aspect of his or her pre-accident life permanently, or for a substantial period of time.

Sixth, self-imposed restrictions on physical activities due to real or perceived pain do not establish that an impairment affected the plaintiff's general ability to lead his or her normal life. Under §3135(7), the dispositive objective inquiry is the plaintiff's actual ability to function and perform specific activities.

ACIA believes that these rules of law will result in proper and consistent results in all "serious impairment" cases.

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STATEMENT OF JURISDICTIONAL BASIS

This Court has jurisdiction to decide this appeal by leave granted pursuant to MCR 7.301(A)(2).

On February 9, 2000, Lapeer County Circuit Court Judge Nick O. Holowka entered an Order for Summary Disposition Pursuant to MCR 2.116(C)(10) in favor of Defendant, ROBERT OAKLAND FISCHER. (70a-71a). Plaintiff, RICHARD ADAM KREINER, timely filed a Claim of Appeal with the Court of Appeals.

On May 31, 2002, Court of Appeals Judges William B. Murphy, Helene N. White, and E. Thomas Fitzgerald issued a published opinion, which reversed the order granting summary disposition to Defendant, and remanded this case for further proceedings. Kreiner v Fischer, 251 Mich App 513; 651 NW2d 433 (2002). In lieu of granting Defendant's application for leave to appeal, this Court vacated the aforementioned opinion, and remanded this case to the Court of Appeals for further consideration. Kreiner v Fischer, 468 Mich 884; 661 NW2d 234 (2003).

On June 3, 2003, Court of Appeals Murphy, White, and Fitzgerald issued another published opinion in Plaintiff's favor. Kreiner v Fischer (On Remand), 256 Mich App 680; 671 NW2d 95 (2003). Defendant timely filed an application for leave to appeal with this Court. By order dated November 6, 2003, this Court granted Defendant's application.

STATEMENT OF QUESTION PRESENTED

- I. & II. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, DID PLAINTIFF'S BACK INJURY AFFECT HIS GENERAL ABILITY TO LEAD HIS NORMAL LIFE, AS REQUIRED FOR RECOVERY OF NONECONOMIC DAMAGES UNDER MCL 500.3135(7)? (ISSUES I & II).

The trial court answered, "No".

The Court of Appeals twice answered, "Yes".

Plaintiff-Appellee contends the answer is, "Yes".

Defendant-Appellant contends the answer is, "No".

Amicus Curiae, ACIA, contends the answer is, "No".

STATEMENT OF FACTS

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION (ACIA), relies on, and adopts by reference, the Statement of Facts & Proceedings presented by Defendant-Appellant, ROBERT OAKLAND FISCHER.

STANDARD OF APPELLATE REVIEW

This appeal involves the interpretation of §3135(7) of the No-Fault Act. Statutory construction is a question of law, which is reviewed de novo. Koontz v Ameritech Services, Inc., 466 Mich 304, 309; 645 NW2d 34 (2002).

The trial court's grant of summary disposition to Defendant was based on MCR 2.116(C)(10). Rulings on such motions are reviewed de novo. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998).

HISTORICAL OVERVIEW OF THE "SERIOUS IMPAIRMENT" THRESHOLD

The phrase "serious impairment of body function" has a long (and, some may say, tortuous) history in Michigan no-fault law. That prerequisite for recovery of noneconomic damages in third-party, "auto negligence" cases has existed since the No-Fault Act was adopted in 1972.¹

For over two decades, the phrase "serious impairment of body function" was not statutorily defined. Accordingly, the Michigan judiciary had to interpret this phrase, and apply it to myriad types of injuries. The most notable decisions from this Court are Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982); and DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1996).

In 1995 PA 222, the Legislature adopted the following definition:

¹1972 PA 294, §3135(1).

" . . . '[S]erious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

MCL 500.3135(7).

Proper interpretation and application of this new definition requires an understanding of (1) how injured people are compensated under Michigan's No-Fault Act; (2) this Court's prior interpretations of the undefined "serious impairment" threshold; (3) what the Legislature intended to accomplish when it enacted the current definition; and (4) how the Court of Appeals has been interpreting and applying §3135(7).

A. Michigan's No-Fault Compensation System.

Of all no-fault states, Michigan provides the most generous compensation for economic losses through payment of first-party, no-fault benefits.²

All expenses incurred for an injured person's care, recovery and rehabilitation are covered, so long as the product, service, or accommodation is reasonably necessary and the charge is reasonable. MCL 500.3107(1)(a).³ Unlike other no-fault states, there is no monetary limit on such expenses, and this entitlement can last for the person's lifetime.

An injured person is also entitled to recover up to three years of work loss, i.e., loss of income from work that person would have performed if he/she had not been injured.

²As will be explained, a Michigan no-fault policy provides up to \$170,455 in coverage for work loss and replacement services alone, for accidents occurring between October 1, 2002, and September 30, 2003. Coverage for medical expenses is unlimited regardless of when the accident occurred.

³In addition to medical expenses, §3107(1)(a) covers a myriad of other expenses, e.g., housing renovation, or alternative housing, to accommodate the person's injuries, Williams v AAA Michigan, 250 Mich App 249, 2258-259; 646 NW2d 476 (2002); modified motor vehicles, Davis v Citizens Ins Co of America, 195 Mich App 323, 327-328; 489 NW2d 214 (1992); travel expenses related to medical treatment, id., 328; and occupational retraining and vocational rehabilitation, Maxwell v Citizens Ins Co of America, 245 Mich App 477, 482-483; 628 NW2d 95 (2001), lv den, 465 Mich 973 (2002).

MCL 500.3107(1)(b). There is a cap on the amount recoverable in a 30-day period, which is adjusted annually for "cost of living" changes. Id.⁴

The injured person can also receive up to \$20 per day for up to three years in "replacement" expenses, i.e., expenses reasonably incurred in obtaining ordinary and necessary services which the injured person would otherwise have performed. MCL 500.3107(1)(c).⁵

When a motor vehicle accident results in death, the decedent's dependents can receive up to three years of "survivor's loss" benefits, which are subject to the same monthly, adjusted cap as "work loss" benefits. MCL 500.3108(1) & (2).⁶ Dependents can also receive up to \$20 per day for up to three years of "replacement" expenses. MCL 500.3108(1). Funeral and burial expenses between \$1,750 and \$5,000 are also compensable. MCL 500.3107(1)(a).

In exchange for substantial payment of the aforementioned economic losses through no-fault benefits, the Legislature limited the injured person's ability to sue a negligent operator and/or owner of a motor vehicle for bodily injuries. The only economic loss damages that a plaintiff can recover from an insured tortfeasor in a third-party "auto negligence" lawsuit are "excess" economic losses (e.g., work loss, survivor's loss, and replacement expenses beyond the daily, monthly and three-year statutory limits). MCL 500.3135(3)(c).

⁴For accidents which occurred between October 1, 2002 and September 30, 2003, the 30-day "work loss" limit is \$4,070. Office of Financial & Ins Services Bulletin 2002-05-INS. Over three years, the potential amount recoverable is \$148,555.

⁵Over three years, the potential amount recoverable for "replacement" expenses is \$21,900.

⁶See also footnote 4, supra.

The Legislature also significantly limited the injured person's ability to sue for noneconomic damages (e.g., damages for pain and suffering). Recovery of noneconomic damages is permitted "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement". MCL 500.3135(1). Those threshold requirements do not apply to claims for "excess" economic loss. Ouellette v Kenealy, 424 Mich 83, 85-86: 378 NW2d 470 (1985).

The Legislature imposed threshold requirements for recovery of noneconomic damages for several reasons:

"... First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if noneconomic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the cost of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault."

Cassidy, 415 Mich at 500 (emphasis added). Accord, DiFranco, 427 Mich at 41.

B. Judicial Interpretation of the Pre-1995 "Serious Impairment" Threshold.

By far, the "serious impairment" threshold has engendered the most judicial debate as to its meaning and application. However, there have been several consistent holdings from this Court.

Unlike the "permanent serious disfigurement" threshold, the "serious impairment" threshold does not include a requirement of permanency.⁷ Accordingly, a plaintiff need not

⁷Before the No-Fault Act was adopted in 1972, the Legislature considered, but rejected, several alternative thresholds, including a requirement that the impairment of body function be permanent. DiFranco, supra, 42-45.

establish that his/her impairment of body function is permanent in order to recover noneconomic damages. DiFranco, supra, 40, 60; Cassidy, supra, 505. Moreover, once the "serious impairment" threshold is met, the plaintiff can recover noneconomic damages for periods when the impairment was not "serious". DiFranco, supra, 42, n 6; Byer v Smith, 419 Mich 541, 544-547; 357 NW2d 644 (1984).

The first challenge to the "serious impairment" threshold concerned its wording. In Advisory Opinion Re: Constitutionality of 1972 PA 294, 389 Mich 441, 477-481; 208 NW2d 469 (1973), this Court held that the phrase "serious impairment of body function" is capable of legal interpretation, and application by triers of fact. This Court further held that the "serious impairment" issue is a question of law for the courts "[o]nly when interpretation approaches or breaches permissible limits." Id., 477-478.

Over the next decade, the Court of Appeals heeded Advisory Opinion's statement that a jury usually should decide whether the plaintiff sustained a serious impairment of body function.⁸

Cassidy v McGovern

In 1982, this Court issued its first definitive opinion as to how the "serious impairment" threshold should be interpreted and applied. There were four key holdings.

First, courts were required to decide, as a matter of law, whether the plaintiff suffered a serious impairment of body function if:

- (a) There was no factual dispute as to the nature and extent of the plaintiff's injuries; or
- (b) There was a factual dispute as to the nature and extent of the injuries, but that dispute was not material to the determination of whether the plaintiff sustained a serious impairment of body function.

⁸DiFranco, supra, 51-52, and cases discussed therein.

Cassidy, *supra*, 488, 502. The contrary holding in *Advisory Opinion* was overruled. *Id.*, 497-498.

The *Cassidy* Court explained that courts should decide this threshold issue because "serious impairment of body function" is not a commonly used term which jurors can clearly understand. Moreover, if this were nearly always a jury issue, a trial would be required in most cases -- a result contrary to the Legislature's goal of reducing "auto accident" litigation. Finally, the *Cassidy* Court believed that the "serious impairment" threshold should not vary by jury, and that uniformity could be better achieved through statutory construction by appellate courts. *Id.*, 501-502.

The remaining holdings provided specific guidance for determining when a "serious impairment of body function" exists. The overall goal was to ensure that this threshold remained a significant obstacle to recovery of noneconomic damages:

"In determining the seriousness of the injury required for a 'serious impairment of body function', this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135; MSA 24.13135. The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle. . . ."

Id., 503.

To satisfy the "serious impairment" threshold, the *Cassidy* Court required that an "important" body function be impaired. *Id.*, 504. The Court explained that if "any" body function sufficed, "arguably a serious impairment of the use of the little finger would meet the threshold requirement." *Id.* Conversely, if the impairment had to be of the "entire" body function, that requirement could unduly limit recovery to "life threatening injuries".

Id.

An "objectively manifested injury" also was required. Id., 505. The Cassidy Court imposed that condition because:

" . . . Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. . . ."

Id.

Finally, the Cassidy Court required an evaluation of "the effect of an injury on the person's general ability to live a normal life." Id., 505.

This Court then applied the aforescribed rules to the facts of two consolidated cases -- Hermann v Haney, and Cassidy v McGovern.

In Hermann, this Court concluded that the plaintiff had not sustained a serious impairment of body function. There, the plaintiff (Barbara Hermann) hit her head on the windshield, and her legs on the dashboard, during the accident. She was briefly unconscious after the accident. She was taken by ambulance to a hospital, x-rayed, given one pain pill for her head, and released. Id., 489.

Ms. Hermann's initial injuries consisted of a bump on her head (which cleared up within one month), and bruises on her knees (which lasted two months). Those bruises were not painful, did not prevent standing or sitting, and did not cause any difficulty. Id.

Two days after the accident, Ms. Hermann's neck and back began to bother her. She subsequently saw a doctor nine times during the ensuing month. On each occasion, hot pads were applied to her back and neck. No medication was prescribed, and her total medical bill was \$185. Id.

On the advice of her doctor, plaintiff temporarily stopped working as an operator for Michigan Bell due to pain caused from prolonged sitting. She stayed home in bed and did no housekeeping. About one month after the accident, Ms. Hermann returned to work and

resumed housework. Although her neck and back continued to bother her "a little bit", Ms. Hermann was able to work a full shift and none of her activities were restricted. Within two months after the accident, she no longer had any back or neck problems. Id., 489-490.

The trial court and the Court of Appeals (by a 2-1 vote) held that the defendant was entitled to summary judgment on the "serious impairment" issue. Id., 490-491. This Court agreed:

"... Mrs. Hermann's injuries were not sufficiently serious to satisfy the threshold requirement. The extent of her injuries was undisputed. The bruises she suffered, which were not troublesome to her, cleared up in two months, and the bump on her head in one month. Although she missed a month of work because of back and neck pain, these pains had diminished after that month, and presented no problems after two months. Wage loss was compensated under no-fault economic provisions."

Id., 503.

In contrast, this Court held that the plaintiff in Cassidy did sustain a serious impairment of body function. There, the plaintiff (Leo Cassidy) was thrown from his vehicle during an accident in August 1975. His injuries included two broken bones in his lower right leg. The fractures in both bones were complete, but did not break the skin. Mr. Cassidy was taken by ambulance to a hospital, where he remained for the next 18 days. Id., 491-492, 504.

During the ensuing seven months, Mr. Cassidy wore four different casts. He used a walker (rather than crutches) because of dizzy spells. X-rays showed that the fractures had healed well by May 1976, and were completely healed by April 1977 (i.e., the last time Mr. Cassidy saw his doctor). Id., 492, 504.

Mr. Cassidy continued to complain of occasional pain in the area of the fractures, particularly when he was active. His doctor opined that the pain could be due to scar tissue, and prescribed medication for the soreness. Nevertheless, the doctor believed that Mr.

Cassidy had returned to normal, and that there was no significant residual damage. During a December 1976 examination, another doctor concluded that the leg appeared capable of normal activity, even though Mr. Cassidy walked with a limp. Id., 492-493.

Mr. Cassidy curtailed some activities incident to his work as a potato farmer. He maintained that his leg continued to give him trouble, and that it had returned only to about 50% of normal. Id., 493.

During trial, Mr. Cassidy moved for a directed verdict on the "serious impairment" issue. The trial court denied that motion because a question of fact existed. The jury returned a verdict of no cause of action. On remand from the Court of Appeals for further findings, the trial court again concluded that reasonable people could differ on the "serious impairment" issue. The Court of Appeals ultimately affirmed the jury's "no cause" verdict. Id., 493-494.

This Court disagreed, and granted Mr. Cassidy a new trial as to damages, for the following reasons:

"Walking is an important body function that for Leo Cassidy was impaired by his broken bones. This conclusion is not affected one way or another by the fact that Leo Cassidy is a potato farmer who must be on his feet for long hours. . . .

". . . Leo Cassidy's injuries were not general aches and pains, but rather two broken bones. Thus, his injuries fall within the classification 'impairment of body function'.

* * * *

"We hold that his two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and that at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function. In so holding, we conclude that an injury need not be permanent to be serious. Permanency is, nevertheless, relevant. (Two injuries identical except that one is permanent do differ in seriousness.)"

Id., 505-506.

Over the next four years, the Court of Appeals issued nearly 40 published opinions applying Cassidy's new rules of law. In most of those cases, the "serious impairment" issue was decided in the defendant's favor, as a matter of law.⁹ That plethora of decisions prompted this Court to re-examine the "serious impairment" threshold.

DiFranco v Pickard

In 1986, DiFranco redefined how the "serious impairment" threshold should be interpreted and applied. That opinion encompassed five consolidated cases in various procedural postures.

Initially, the DiFranco Court held that the "serious impairment" issue should be submitted to the trier of fact whenever reasonable minds could differ on the answer. That rule was to be applied even where there was no material factual dispute as to the nature and extent of the plaintiff's injuries. DiFranco, 427 Mich at 38, 58. Conversely, if reasonable minds could not differ, courts could decide the "serious impairment" issue as a matter of law. Id., 51-52. That ruling modified Cassidy's "question of law" analysis, and marked a return to the procedural rules articulated in Advisory Opinion. Id., 58.

The DiFranco Court acknowledged that this holding would result in more cases going to trial. However, the same situation had existed for a number of years after Advisory Opinion was decided, which the Legislature never attempted to change. Id., 55-56.

More importantly, the DiFranco Court believed that "trial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function." Id., 56. For example,

⁹See cases cited in DiFranco, 427 Mich at 38, 56-57, 62-66, nn 30-32, 38-49.

conflicting results had been reached by different Court of Appeals' panels reviewing the same case, as well as cases involving similarly injured plaintiffs. Id., 56-57. "Without further guidance from the Legislature", the DiFranco Court believed that a jury's collective judgment was preferable to "the views of one trial judge, and perhaps a panel of appellate judges reviewing a cold record." Id., 57.

The DiFranco Court further held that the "serious impairment" threshold "is a significant, but not extraordinarily high, obstacle to recovering [noneconomic] damages." Id., 39. The court explained that "[t]he three threshold injuries listed in §3135(1) are not equivalent in severity." Id., 60. Specifically, the "serious impairment" threshold:

"was designed to eliminate suits based on clearly minor injuries, and those which do not seriously affect the ability of the body, in whole or in part, to function."

Id., 60.

The DiFranco Court also overruled the three requirements for recovery of noneconomic damages imposed by Cassidy.

First, the requirement that an "important" body function be impaired was rejected because it had no basis in the statutory language or legislative history. Id., 39, 61-62. The DiFranco Court agreed with Cassidy's statement that the entire functioning of the body need not be seriously impaired. Id., 39, 61. As to the possibility that a minor injury could be described as a serious impairment of some body function, the DiFranco Court believed that "the judiciary is fully capable of weeding out trivial cases without having to determine whether the body function impaired is important." Id., 62.

The "objectively manifested injury" requirement (as subsequently interpreted by the Court of Appeals) also was rejected because it had "proved to be an almost insurmountable obstacle to recovery of noneconomic damages in soft tissue injury cases." Id., 40, 73. The

DiFranco Court refused to limit recovery only to injuries that can be directly detected by accepted medical tests or procedures (e.g., x-rays). The Court explained that Cassidy had only required a medically identifiable injury and a physical basis for the plaintiff's subjective complaints of pain. Id., 40, 74-75.

Third, the "general ability to lead a normal life" test was discarded because it too had proven to be an almost insurmountable obstacle to recovery of noneconomic damages. Id., 39, 62-67. The DiFranco Court gave several reasons for this ruling.

In the DiFranco Court's words, "The most obvious problem is defining what constitutes 'a normal life'." Id., 62. The Court of Appeals had never attempted to define that term "since it usually conclude[d] that the injury sustained did not significantly affect the *plaintiff's* lifestyle or daily activities." Id., 62-63 (italics in original). In some cases, the Court of Appeals had denied relief even where the injuries significantly affected the plaintiff's normal lifestyle. Id., 63.

Next, the DiFranco Court observed that there was no basis in the statutory language for comparing the plaintiff's lifestyle before and after the accident:

"The 'general ability' test was an attempt to devise an objective standard for evaluating the effect of an injury upon the body's ability to function. To the extent that the *Cassidy* Court refused to focus solely on how the injury affected the particular plaintiff's way of life, we agree that this was not the intent behind §3135(1). Unlike other states, the Legislature did not enact a threshold which looks at how the injury affected the plaintiff's ability to work or perform his normal activities. Instead, the relevant inquiries are whether the injury impaired a body function and, if so, whether that impairment was serious."

Id., 65.

In addition, such comparisons could lead to the following "anomalous results":

"Focusing on the effect an injury has on a particular person's life can lead to anomalous results. Suppose a concert violinist sustains severe permanent injuries to his legs in an auto accident and is required to use a wheelchair.

If the violinist previously lived a sedentary life and has a good mental outlook, the injury may not seriously affect his daily routine, work, or recreational activities. However, he has clearly suffered a serious impairment of body function.

"Suppose the same violinist suffers a permanent loss of dexterity in his little finger. Although the injury does not prevent the violinist from performing routine tasks with his hand, the injury has effectively ruined his performing career. The violinist undoubtedly suffers more mental anguish than a similarly injured soccer player. However, the 'serious impairment of body function' threshold bars recovery of noneconomic damages for minor injuries, regardless of how seriously the injury affects a particular person's life. The violinist can only recover his medical expenses and wage loss.

"A test which merely compares the activities which the plaintiff could perform before and after the accident could reward the malingerer or hypochondriac, while penalizing the person who cannot afford to miss work or tries to function despite the pain. However, a test which attempts to compare the plaintiff's post-accident activities and abilities to a hypothetical person's 'normal life' is equally flawed. Very simply, there is no such thing as 'a normal life.' Determining which activities are essential to living a normal life is an equally impossible task."

Id., 65-66.

Instead, the DiFranco Court held that the phrase "serious impairment of body function" involved "two straightforward inquiries":

"(1) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?

"(2) Was the impairment serious?"

Id., 39, 67.

In addition to instructing juries on these two inquiries, the DiFranco Court required the following instruction on how to determine "seriousness":

". . . [T]he jury should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious."

Id., 39-40, 69-70.¹⁰ These factors were similar to those adopted in Hermann v Haney, 98 Mich App 445, 449-450; 296 NW2d 278 (1980) (the companion case to Cassidy). DiFranco, 68, n 50.

To provide further guidance, the DiFranco Court offered numerous examples of how those factors should be evaluated:

"The extent of an impairment is often expressed in numerical terms. A person who suffers a permanent seventy-five-percent limitation in back movement has clearly suffered a serious impairment of back function, while a person with a permanent five-percent limitation probably has not. However, the particular body function impaired may also make a difference. A ten-percent permanent reduction in brain functioning is a more serious impairment of body function than a ten-percent limitation of neck motion.

"The length of time the impairment of body function lasts must also be considered. A person who is rendered unconscious for several minutes at the scene of the accident has suffered a substantial impairment of brain functioning during those minutes. If there are no further problems, the impairment overall does not appear serious. A permanent impairment is more serious than a temporary impairment of like character. However, the fact that the plaintiff eventually makes a complete recovery should not negate the fact that he endured a serious impairment of body function for a significant period of time. A permanent impairment may or may not be serious, depending on the extent of the impairment and body function affected.

"The type of treatment required to rectify the impairment may also be relevant. An impairment which can only be corrected by surgery may be more serious than one that can be remedied by bed rest. A comparison of the plaintiff's abilities and activities before and after the accident may be relevant insofar as it establishes the existence, extent, and duration of an impairment of body function. Additional relevant factors may also be considered in determining seriousness.

"We believe that this approach will not penalize the person who returns to favored work, or reward the malingerer who has little medical basis for his complaints. The effect of the injury on the plaintiff's body functions is the paramount consideration, rather than the effect of the injury on the plaintiff's (or a hypothetical person's) life."

Id., 67-69.

¹⁰These statements were subsequently embodied in SJI2d 36.01.

Applying those new rules of law, the DiFranco Court concluded that a question of fact existed on the "serious impairment" threshold in each of the five consolidated cases. The ultimate result in each case turned on whether that issue had been submitted to a jury. If it had, the jury's verdict was affirmed.¹¹ If the trial court had decided the "serious impairment" issue as a matter of law, that order was reversed and the case was remanded for further proceedings.¹²

The concurring/dissenting justices in DiFranco agreed with the ultimate result in each case. Id., 92, 96-97. Instead, they would have retained Cassidy's requirements that the "serious impairment" threshold be decided as a matter of law by the courts, and that an "important" body function be impaired. Id., 92-95. Those justices further believed that the "general ability to lead a normal life" test was still "useful":

"As to the 'general ability to live a normal life' test, while I do not regard it as exclusively definitive, I do regard it as useful. The question is whether there has been a serious impairment of body function. Medically there are scientific tests to measure this. But there are practical tests that may also be useful. A person's ability to walk, talk, lift, and perform normal daily activities is an important consideration in determining the seriousness of an injury. While these matters in many cases depend upon the credibility of the plaintiff, judges and juries resolve questions of credibility every day."

Id., 95-96 (emphasis added).

Over the next nine years, the Court of Appeals issued several published opinions discussing DiFranco's "serious impairment" rules. Some cases decided that issue as a matter

¹¹DiFranco v Pickard, supra, 75-78 (judgment based on jury's "no cause" verdict affirmed); Burk v Warren, supra, 79-81 (same); Paupore v Rouse, supra, 81-85 (same); Kucera v Norton, supra, 85-88 (jury verdict for plaintiff reinstated).

¹²Rutley v Dault, supra, 88-91 (summary judgment for defendant reversed).

of law because the undisputed facts clearly favored the plaintiff¹³ or the defendant.¹⁴

Other cases concluded that a question of fact existed, which resulted in affirmance of a jury verdict,¹⁵ or reversal of an order granting summary disposition to the defendant.¹⁶

C. 1995 Amendment to the "Serious Impairment" Threshold.

In 1995 PA 222, the Legislature defined "serious impairment of body function" as:

"an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

MCL 500.3135(7).

In addition, the Legislature required courts to decide the "serious impairment" issue as a matter of law, if one of two situations exist:

- "(a) The issues of whether an injured person has suffered serious impairment of body function . . . are questions of law for the court if the court finds either of the following:
 - "(i) There is no factual dispute concerning the nature and extent of the person's injuries.
 - "(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as

¹³McLean v Wolverine Moving & Storage Co, 187 Mich App 393, 398; 468 NW2d 230, lv den, 437 Mich 1028 (1990).

¹⁴Kallio v Fisher, 180 Mich App 516; 448 NW2d 46 (1989); Johnston v Thorsby, 163 Mich App 161; 413 NW2d 696 (1987).

¹⁵A jury's "no cause" verdict was affirmed in Richards v Pierce, 162 Mich App 308, 313-315; 412 NW2d 725 (1987); and Beard v City of Detroit, 158 Mich App 441, 449-452; 404 NW2d 770 (1987).

¹⁶Owen v City of Detroit, 163 Mich App 137-139; 413 NW2d 679 (1987).

In two other "summary disposition" cases, the Court of Appeals remanded the matter for reconsideration in light of DiFranco. VanSickle v McHugh, 171 Mich App 622, 628; 430 NW2d 799 (1988); Troutman v Ollis, 164 Mich App 727, 738; 417 NW2d 589 (1987), lv den, 431 Mich 855 (1988).

to whether the person has suffered a serious impairment of body function. . . ."

MCL 500.3135(2)(a)(i) & (ii).¹⁷

The Court of Appeals has observed that these amendments effectively overruled DiFranco, and reinstated the standards articulated in Cassidy.¹⁸ The legislative analysis of 1995 PA 222 confirms that was precisely what the Legislature intended:

damages and that 'the impairment need not be of the entire body function or of an important body function', and 'need not be permanent.' This decision has governed application of the tort threshold since then. Insurance companies and some others have portrayed this decision as an unwarranted liberalization of the no-fault law that has led to increased litigation and increased costs to the insurance system, thus contributing to higher premiums for insurance consumers. Amendments to the no-fault statute . . . would return to a tort threshold resembling that provided by the Cassidy ruling. . . ."

House Legislative Analysis Section, HB 4341 as enrolled, 1995 PA 222, Second Analysis (12/18/95), p 1 (attached as Appendix B) (emphasis added).

"ARGUMENTS:

"For:

Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits for non-economic ('pain and suffering') damages was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision. That means making the determination of whether the threshold for a lawsuit has been met a question of law for a judge to decide and not for a jury. And it means that the term 'serious impairment of body function' would once again refer to 'an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life' (emphasis added). Together, these provisions will work toward ensuring that the cases that go forward are deserving of a hearing before a jury. The undeserving and frivolous cases will be weeded out."

Id., p 2 (emphasis in original and added).

D. Post-1995 Cases Deciding the "Serious Impairment" Issue as a Matter of Law.

To date, the Court of Appeals has applied §3135(7), as a matter of law, in five published cases (including the instant case). Those decisions (in chronological order) are as follows.

Kern v Blethen-Coluni
240 Mich App 333; 612 NW2d 838 (2000)

In Kern, the Court of Appeals held that the 9-year-old plaintiff had sustained a serious impairment of body function. There, plaintiff's right femur was fractured when he was struck by a motorist while riding a bicycle. The resulting surgery involved installing an external fixator, which was attached to the outside of plaintiff's femur with four pins drilled into the bone. Plaintiff was hospitalized for six days, four of which involved traction. Plaintiff missed three weeks of school due to his hospitalization and initial surgery. Id., 335.

During the 11 weeks following the accident, plaintiff was carried, used a wheelchair, or "hobbled" on his left leg. Plaintiff underwent a second surgery to remove the fixator and pins. Id.

Four months after the accident, plaintiff's doctor concluded that the fracture was well healed, and that plaintiff had excellent range of motion with almost full flexion. Plaintiff was advised to limit his activities for the next three months, i.e., he could do a little running and bicycling, and should avoid activities involving playground equipment. About seven months after the accident, plaintiff was able to resume unrestricted activities. Id., 345-346.

At trial (which occurred 18 months after the accident), plaintiff testified that his activities were unrestricted. However, his leg "kind of bothered" him when he ran too much or "slept on it wrong". Id., 344.

A jury concluded that plaintiff had not sustained a serious impairment of body function. In a post-judgment motion, plaintiff's attorney first advised the trial court that 1995 PA 222 applied, and requested a ruling that plaintiff had sustained a serious impairment as a matter of law. The trial court denied that motion. Id., 336-337. By a 2-1 vote, the Court of Appeals reversed and remanded for a trial as to damages.

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The Kern majority held that the "serious impairment" issue should have been decided as a matter of law because the relevant facts were undisputed. Id., 343-344.¹⁹ Since the Legislature had adopted the Cassidy standards in §3135(7), the majority believed that Cassidy and its progeny were instructive in resolving the "serious impairment" issue. Id., 342.

The Kern majority summarized the applicable rules as follows:

"In determining whether the impairment of the important body function is 'serious' the court should consider the following non-exhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. *Hermann v Haney*, 98 Mich App 445, 449; 296 NW2d 278 (1980), aff'd, 415 Mich 483; 330 NW2d 22 (1982). Finally, although the injury threshold is a significant obstacle to tort recovery, *Cassidy, supra* at 503, 'an injury need not be permanent to be serious.' *Id.*, at 505."

Id., 341. The analyses and results reached in two "fractured femur" cases were also examined -- this Court's decision in Cassidy, and LaHousse v Hess, 125 Mich App 14; 336 NW2d 219 (1983). Id., 342-343.

Based on the foregoing, the Kern majority concluded:

"The present case similarly involves a serious femur fracture and plaintiff's inability to walk for three months. Walking is an important body function. Although plaintiff had a good recovery, 'an injury need not be permanent to be serious.' *Cassidy, supra* at 505. In light of the seriousness of the initial injury, the treatment required, and the duration of disability, we hold that plaintiff sustained a serious impairment of body function."

Id., 343.

¹⁹The concurring/dissenting judge would have remanded the case to the trial court for an initial determination of whether a material factual dispute existed. Id., 345-347.

May v Sommerfield
239 Mich App 197; 607 NW2d 422 (1999)
May v Sommerfield (After Remand)
240 Mich App 504; 617 NW2d 920 (2000)

In May, the Court of Appeals concluded that plaintiff had not sustained a serious impairment of body function. There, the plaintiff suffered inter alia a visible injury to his arm, which eventually resolved. However, plaintiff continued to experience pain in that area. 239 Mich App at 200.

The trial court concluded that the injury was objectively manifested, but had not affected plaintiff's general ability to lead his normal life. The court explained that plaintiff was "still doing all of the things that constituted his normal lifestyle before the accident, even though he's doing them with pain." Id., 200-201.

Initially, the Court of Appeals remanded the case for further findings as to whether a material factual dispute existed as to the nature and extent of plaintiff's injuries, as well as the three requirements for recovery under §3135(7). Id., 202-203. On remand, the trial court concluded that there was no material factual dispute that the impairment had not affected plaintiff's general ability to lead his normal life. 240 Mich App at 506.

The Court of Appeals affirmed the trial court's grant of summary disposition to defendant, with the following observations:

"... The plain language of MCL 500.3135(7); MSA 24.13135(7) defines a serious impairment of body function in subjective terms, i.e., as an impairment that 'affects the person's general ability to lead his or her normal life.' The trial court properly compared plaintiff's lifestyle before and after the accident in determining whether a factual dispute existed with respect to the extent of the plaintiff's injuries."

Id.

Miller v Purcell
246 Mich App 244; 631 NW2d 760 (2001)

In Miller, the Court of Appeals held that plaintiff had not sustained a serious impairment of body function. There, plaintiff sustained injuries to her neck, arms and back, including an acromioclavicular separation and mild tendonitis. She initially underwent physical therapy, and subsequently went to an orthopedic surgeon. At the time of her deposition, plaintiff was taking prescription pain medication daily. Id., 245, 249.

Except for doctor appointments, plaintiff missed no time from her job as an account clerk in a county register of deeds. Plaintiff admitted that she could perform nearly all of the same activities that she did before the accident, including work and household tasks. Her only limitations were an inability to knit, and an occasional need to type one-handed, due to pain. Id., 249-250 & n 2.

The trial court concluded that factual issues existed, which precluded it from deciding the "serious impairment" issue as a matter of law. The court believed that plaintiff's complaints of pain while performing day-to-day activities could elevate her injury to a serious impairment of body function. Id., 248. The Court of Appeals disagreed.

The Miller Court relied on Kern's factors for determining whether an impairment is serious. Id. The Court also relied on Cassidy's observation that, "'recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.'" Id., 249, quoting Cassidy, supra, 505. After recounting plaintiff's injuries, treatment, and ability to function after the accident, the Miller Court concluded:

"... Plaintiff has not demonstrated that any aspect of her day-to-day activities has been curtailed as a result of her injury. Furthermore, it appears from the record that plaintiff's injury was minor, she did not have to undergo a signifi-

cant amount of medical treatment, and there is no indication that her prognosis for recovery is anything but favorable.

"Plaintiff points to her inability to knit and having to type one-handed at times as evidence of a serious impairment of body function. While we sympathize with plaintiff, the record is clear that her general ability to lead her normal life has not been significantly altered by her injury. *Burk v Warren (After Remand)*, 137 Mich App 715; 359 NW2d 541 (1984), and cases cited therein.

"Because plaintiff failed to meet the threshold of §3135, we hold the trial court erred in not granting summary disposition in favor of defendant."

Id., 250.

Kreiner v Fischer
251 Mich App 513; 651 NW2d 433 (2002),
vacated and remanded 468 Mich 884; 664 NW2d 212 (2003)
Kreiner v Fischer (On Remand)
256 Mich App 680; 671 NW 2d 95 (2003)

In Kreiner (the instant case), the Court of Appeals twice concluded that Plaintiff had sustained a serious impairment of body function, if the following facts were as Plaintiff had alleged.²⁰

Plaintiff (who was 34 years old) complained of pain in his lower back, right hip, and right leg after his motor vehicle accident. Objective medical tests revealed radiculopathy (i.e., a malfunction) of the L4 nerve root; grade 1 to grade 2 spondylolysis (i.e., arthritic like changes) between L5 and S1; degenerative disc disease; facet degenerative changes; and sciatic nerve irritation in the right leg. Plaintiff also had tenderness and stiffness in the lumbar region. Plaintiff's doctor opined that the L4 radiculopathy might heal, but the degeneration of Plaintiff's spine was permanent. Trauma was a common cause of such conditions. 251 Mich App at 517 & nn 2-3.

²⁰The following facts are taken from the Court of Appeals' opinions. As will be explained in Issue II., the trial court record contains additional, relevant facts.

Plaintiff did not respond to physical therapy, nerve block injections, or pain medication. Accordingly, Plaintiff's physician advised him to avoid lifting over 15 pounds, and avoid unnecessary bending and twisting. Id., 517.

At the time of the accident, Plaintiff was working 8 hours a day as a carpenter. After the accident, Plaintiff continued to work, but only for 6 hours per day. In addition, he discontinued roofing work, limited ladder work to 20 minutes at a time, and did not lift more than 80 pounds. Finally, Plaintiff no longer walked more than one-half mile at a time, and discontinued certain types of recreational hunting. Id., 518-519 & n 6.

The trial court found that Plaintiff's injuries were objectively manifested, and had impaired an important body function (i.e., the movement of Plaintiff's back). However, the trial court concluded that Plaintiff's impairment was not "serious enough" to impinge on his ability to lead a normal life. Id., 518. The Court of Appeals concluded that the last ruling "was error" because:

"... The third prong of the statutory definition explicitly requires only that the impairment 'affect[] the person's general ability to lead his or her normal life.' MCL 500.3135(7) does not require any additional proof. It would be improper for us to read any more requirements, limitations, or language into the unambiguous statutory definition. . . ."

Id., 518.

The Kreiner Court concluded that if the facts were not in dispute, Plaintiff would be entitled to summary disposition because his impairment affected his general ability to lead his normal life. Id., 519. The Court explained:

"Plaintiff's normal life consisted of, in large part, working as a carpenter. Plaintiff's employment was not an insignificant and occasional event in his life but was instead a part of his normal routine. If Plaintiff's testimony is true, the impairment 'affected' his general ability to lead his normal life by limiting his activities as a carpenter. Plaintiff's ability to work a full 8-hour day was reduced by 25%, and he testified he could no longer accepted roofing

jobs. Plaintiff was further limited in performing his job by weight and movement restrictions."

Id., 519 & n 6.

The Kreiner Court remanded the case to the trial court to determine whether there was a material factual dispute regarding the effect of Plaintiff's injury on his ability to work. If there was no such dispute, the trial court was directed to grant summary disposition to Plaintiff on the "serious impairment" issue. If there was a factual dispute, that matter was to be submitted to a jury. Id., 519.

In lieu of granting Defendant's application for leave to appeal, this Court vacated the Court of Appeals' opinion, and remanded the case to the Court of Appeals with the following instructions:

"The no-fault act, MCL 500.3135(7), defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." The circuit court granted defendant's motion for summary disposition, concluding that the plaintiff's impairment is not "serious enough" to meet the tort threshold. The Court of Appeals reversed, concluding that plaintiff is not required to show that his impairment "seriously" affects his ability to lead his normal life in order to meet the tort threshold. The Court of Appeals then concluded that, if the facts as alleged by plaintiff are true, his impairment has affected his general ability to lead his normal life. In our judgment, both the circuit court and the Court of Appeals erred. Although a serious effect is not required, any effect does not suffice either. Instead, the effect must be on one's general ability to lead his normal life. Because the Supreme Court believes that neither of the lower courts accurately addressed this issue, the case is remanded to the Court of Appeals for it to consider whether plaintiff's impairment affects his general ability to lead his normal life.'"

468 Mich at 884-885 (italics in original; underlining added).

In its opinion on remand, the Court of Appeals incorporated most of its original opinion. 256 Mich App at 682-688. The Kreiner Court added the following commentary regarding the significance of limitations on a person's ability to work:

"We find that one's general ability to lead his or her normal life can be affected by a injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar. Employment or one's livelihood, for a vast majority of people, constitutes an extremely important and major part of a person's life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment. Losing the ability to work can be devastating; employment, regardless of income issues, is important to a sense of purpose and a feeling of vitality. For those working a standard forty-hour work week, a quarter of their lifetime before retirement is devoted to time spent on the job. An injury affecting one's employment and ability to work, under the right factual circumstances, can be equated to affecting the person's general ability to lead his or her normal life. For many, life in general revolves around a job and work. It would be illogical to conclude that where a person loses the ability to work because of an injury resulting from a motor-vehicle collision, after being gainfully employed, the person's life after the accident, in general, would be unaffected."

Id., 688-689 (italics in original; underlining added).

Thereafter, the Kreiner Court observed that this Court's remand order indicated that:

". . . when considering a person's ability to lead a normal life, the focus must be on multiple aspects of the person's life, i.e., home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life such as employment."

Id., 689.

According to the Kreiner Court, injuries which affect a person's ability to work often impact other aspects of the person's life:

". . . The employment facet of a person's life cannot be viewed in a vacuum; the inability to work necessarily affects many aspects and areas of a person's life outside the job itself. There can be no doubt that the inability to work affects home life and relationships and creates and places monetary limits on daily and recreational activities. As such, an injury impacting employment can affect a person's life in general. Moreover, injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life."

Id., 689 (emphasis added).

The Kreiner Court again concluded that Plaintiff's evidence established a serious impairment of body function because his ability to walk, perform certain movements, and

engage in recreational hunting and employment were limited by his injury. Id., 689. The fact that Plaintiff continued working after the accident did not warrant a contrary conclusion:

"Because plaintiff remained employed and was working after the injury, the Supreme Court's remand order might be read to suggest that the effect on one's employment must be sufficiently serious in order to properly conclude that a person's general ability to lead his or her normal life has been affected. However, such a reading would be contrary to the Supreme Court's own determination that a serious effect is not required. Nevertheless, there was documentary evidence presented indicating that plaintiff's ability to work a full eight-hour day was reduced by twenty-five percent, that he could no longer do roofing jobs, that ladder work was limited, and that there were weight and movement restrictions. These limitations, if proved, are significant enough to support a finding that plaintiff's impairment affected his general ability to lead his normal life."

Id., 689-690. The case was again remanded to the trial court for a determination of whether a material factual dispute existed regarding Plaintiff's claimed limitations. Id., 690.

This Court subsequently granted Defendant's application for leave to appeal.

Straub v Collette
254 Mich App 454; 657 NW2d 178 (2002),
vacated and remanded, 468 Mich 918; 664 NW2d 212 (2003)
Straub v Collette (On Remand)
258 Mich App 456; 670 NW2d 725 (2003)

In Straub, the Court of Appeals twice concluded that plaintiff's four-month recuperation from his hand injury satisfied the "serious impairment" threshold. The following facts were undisputed.

On September 19, 1999, plaintiff was struck by a motorist while riding a motorcycle. The resulting injuries to his non-dominant left hand were a closed left fifth metacarpal displaced neck fracture (i.e., a "boxer's" fracture), and open wounds to his middle and ring fingers, which included extensor tendon injuries. Plaintiff underwent outpatient surgery, attended some physical therapy, and wore a cast. 254 Mich App at 455.

At the time of the accident, plaintiff was a cable lineman. He did not work from the date of the accident to November 1999, when he returned to that job part-time. He began working full time on December 14, 1999. During the same time period, plaintiff had difficulty performing household and personal tasks, operating his bow shop, and processing deer during the 1999 deer season. Id., 455-456.

Plaintiff also played bass guitar in a band that performed almost every Friday or Saturday night in night clubs and private clubs. In addition, he practiced guitar three or four times per week. Plaintiff did not resume playing the guitar until mid-January 2000 due to insufficient strength in his fingers. Id.

During his deposition, plaintiff testified that he had a continuing inability to completely straighten out his middle finger. In addition, he could not completely close his left hand. Id., 456.

The trial court concluded that plaintiff could not satisfy the "serious impairment" threshold. The Court of Appeals agreed "that plaintiff was free of any serious impairment of body function by mid-January 2000." Id., 457. The remaining question was whether a serious impairment existed between the date of the accident and mid-January 2000.

The Straub Court held that plaintiff's hand injuries were objectively manifested, and the ability to use his hand was an important body function. Id., 457. In determining whether the injury affected plaintiff's general ability to lead his normal life, the Court observed that an impairment need not be permanent to be serious. Id. The Straub Court recounted Kern's factors for determining when an impairment is serious, and compared plaintiff's lifestyles before and after the accident. Id., 458.

The Straub Court concluded that plaintiff's injury had sufficiently affected his general ability to lead his normal life, based in large measure on the Court of Appeals' initial opinion in Kreiner:

" . . . In this case, the undisputed evidence indicated that the plaintiff had regularly performed as a musician playing the bass guitar, but was unable to do so for about four months as a result of the injuries that he suffered in the accident. Given plaintiff's undisputed deposition testimony that he performed in a band that gave performances almost every weekend and additionally practiced three or four times a week, being able to play the bass guitar was a major part of plaintiff's normal life. Further, the period of about four months that plaintiff could not perform musically was a significant amount of time. In addition, plaintiff was limited in his ability to work at his full-time employment for about three months. . . . [W]e conclude that plaintiff's injuries constituted a serious impairment of body function because, albeit for a relatively limited time, they did affect his general ability to lead his normal life, particularly his ability to perform musically and to work, both of which were integral parts of his normal life. See *Kreiner, supra*, at 518-519 (considering evidence that the plaintiff in that case was limited in the time he could work and unable to participate in 'certain types of recreational hunting' as supporting a conclusion that he suffered a serious impairment of body function). It is immaterial that the same injury suffered by a hypothetical person who led a more sedentary lifestyle than plaintiff, or who did not rely on the use of the non-dominant hand as much as plaintiff did, might not constitute a serious impairment of body function."

Id., 458-459 (emphasis added). Accordingly, the Straub Court reversed the trial court's grant of summary disposition to defendant, and remanded the case for further proceedings.

In lieu of granting defendants' application for leave to appeal, this Court vacated the Court of Appeals' opinion. The Straub Court was directed to reconsider the case in light of this Court's order in Kreiner. 468 Mich 918; 661 NW2d 234 (2003).

In its opinion on remand, the Straub Court reiterated plaintiff's work limitations during his initial four-month recuperation. Other limitations were also noted, i.e., plaintiff "could not perform, or had significant difficulty performing household and personal tasks, such as washing dishes, doing yard work, and showering and dressing himself, until December 1999." Moreover, plaintiff lived alone, and was solely responsible for maintain-

ing his home and property, and performing personal tasks. Finally, when plaintiff resumed playing guitar, he had to change his finger formation due to his inability to completely straighten his left middle finger. Straub, 258 Mich App at 461-462.

The Straub Court again concluded that the effect of plaintiff's hand injury on his general ability to lead his normal life was significant enough to satisfy the "serious impairment" threshold. The Court of Appeals' second opinion in Kreiner played a major role in the panel's analysis:

"Therefore, not only was plaintiff's ability to work as a cable lineman and bass guitar player affected, but his ability to perform everyday household tasks, and operate his bow shop were significantly affected as well. Our emphasis regarding plaintiff's guitar playing should not be construed as constituting the sole reason supporting our conclusion that plaintiff suffered a serious impairment of body function. But it is a factor in our determination in this case because of its significance in plaintiff's life. Although plaintiff had a 'day' job, playing in the band was no less an integral part of plaintiff's life. As this Court stated in Kreiner (On Remand), supra at 688, 'Employment or one's livelihood, for a vast majority of people, constitutes an extremely important and major part of a person's life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment.' As the Kreiner Court also recognized, 'injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life.' Id. at 689. We are not suggesting that any injury sustained from a motor vehicle collision that results in the plaintiff losing the ability to work constitutes 'serious impairment of body function.' But we are cognizant of the reality, as was this Court in Kreiner (On Remand), supra, that such a injury, 'under the right factual circumstances, can be equated to affecting a person's general ability to lead his or her normal life.' Id. at 688; emphasis in original. We find these circumstances exist here.

"In this case, plaintiff lost the use of his left hand for three months, which significantly affected plaintiff's general ability to lead his normal life given the work and tasks that he performed before the accident 'in his normal life.' And so, we conclude as a matter of law that plaintiff suffered 'serious impairment of body function' as defined by MCL 500.3135 (7). . . ."

Id., 462-463 (emphasis added).

This Court subsequently granted defendants' application for leave to appeal, Docket No. 124757.

I. **TO DETERMINE WHETHER AN IMPAIRMENT OF BODY FUNCTION AFFECTED THE PERSON'S "GENERAL" ABILITY TO LEAD HIS OR HER NORMAL LIFE WITHIN THE MEANING OF MCL 500.3135(7), ALL ASPECTS OF THE PERSON'S PRE- AND POST-ACCIDENT FUNCTIONAL ABILITIES AND ACTIVITIES MUST BE EXAMINED AND GIVEN APPROPRIATE SIGNIFICANCE. TO DETERMINE WHETHER A PERSON'S "ABILITY" TO LEAD HIS OR HER NORMAL LIFE HAS BEEN AFFECTED, THE FOLLOWING NON-EXHAUSTIVE OBJECTIVE FACTORS SHOULD BE CONSIDERED -- THE NATURE AND EXTENT OF THE IMPAIRMENT, THE TYPE AND LENGTH OF TREATMENT REQUIRED, THE DURATION OF THE IMPAIRMENT, THE EXTENT OF ANY RESIDUAL IMPAIRMENT, AND THE PROGNOSIS FOR EVENTUAL RECOVERY.**

Under the 1995 amendments to §3135, the judiciary must decide whether a plaintiff can satisfy the "serious impairment" threshold if there is no dispute, or no material dispute, as to the nature and extent of the plaintiff's injuries. MCL 500.3135(2)(a)(i) & (ii). The same "question of law" procedure was adopted in Cassidy. Unfortunately, the ensuing Cassidy-era decisions from the Court of Appeals often reached irreconcilable results. To avoid the same situation, this Court should provide a definitive and specific framework for determining when a "serious impairment of body function" does, and does not, exist under §3135(7).

The statutory definition of "serious impairment of body function" contains three elements:

"[1] an objectively manifested impairment [2] of an important body function [3] that affects the person's general ability to lead his or her normal life."

MCL 500.3135(7) (numbering added).

The dispositive issue in this case is how the third element should be interpreted and applied. The Court of Appeals already has provided substantial guidance in answering this

question, but has not yet articulated all of the relevant considerations. ACIA requests that this Court adopt the following rules of law.

First, the three requirements imposed by §3135(7) are nearly identical to those adopted in Cassidy. The legislative analysis of the 1995 amendments confirms that the Legislature wanted to "return to a tort threshold resembling that provided by the Cassidy ruling", which had adopted "a restrictive definition of 'serious impairment of body function'". House Legislative Analysis Section, HB 4341 as enrolled, supra, p 1 (Appendix B, 1). In Cassidy, supra, 503, this Court held that the "serious impairment" threshold should be considered in conjunction with the other "two significant obstacles to a tort action for noneconomic loss", i.e., death and permanent serious disfigurement.

Accordingly, the Court of Appeals has observed that the current "serious impairment" threshold "is a significant obstacle to tort recovery", Kern, 240 Mich App at 341; and limits recovery "to severe conditions". Jackson v Nelson, 252 Mich App 643, 653; 654 NW2d 604 (2002), lv den, 468 Mich 884 (2003). That threshold was "designed to eliminate suits based on clearly minor injuries". May, 239 Mich App at 200. "'Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.'" Jackson, supra, 650, and Miller, 246 Mich App at 249, quoting Cassidy, supra, 505.

Second, there is one notable difference between Cassidy and the statutory definition. Cassidy, supra, required an evaluation of "the effect of an injury on the person's general ability to live a normal life", which did not turn on how the injury affected the particular person's life. Id. The DiFranco Court criticized this requirement because "there is no such thing as 'a normal life'". DiFranco, 427 Mich at 66. Cognizant of that comment, the

Legislature instead required that the impairment affect "the person's general ability to lead his or her normal life." (Emphasis added).

Accordingly, the Court of Appeals has held that a comparison of the plaintiff's lifestyle before and after the accident is appropriate. Straub, 258 Mich App at 460; May, 240 Mich App at 506. That inquiry looks to the effect of the impairment on the particular plaintiff's life, rather than a hypothetical person's life.

Third, this Court has already held that "any" effect on the plaintiff's life is insufficient to satisfy §3135(7). Conversely, a "serious" effect is not required. Instead, the effect must be on the person's "general" ability to lead his or her normal life. Kreiner, 468 Mich at 885.

The word "general" is not defined in §3135(7), or any other portion of the No-Fault Act. Accordingly, its dictionary definition can be used to determine its plain and ordinary meaning. Koontz, 466 Mich at 312.

"General" is defined in pertinent part as:

"1: involving or belonging to the whole of a body, group, class, or type : applicable or relevant to the whole rather than a limited part, group, or section . . . 4: marked by broad overall character without being limited, modified, or checked by narrow precise considerations : concerned with main elements, major matters rather than limited details, or universals rather than particulars. . . ."

Webster's Third New Int'l Dictionary (Unabridged), (1986 ed). p 944.

In this case, the Court of Appeals interpreted this Court's remand order as requiring an evaluation of "multiple aspects of the person's life, i.e., home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life". Kreiner, 256 Mich App at 689. In light of the dictionary definition of "general", it is

more accurate to say that all aspects of the person's life must be examined. Straub, supra, 461.

In addition to the "activities" listed by the Court of Appeals, there are myriad other aspects of living. Most significantly, there are basic human functions such as thinking, seeing, talking, eating, walking, sitting, standing, lifting, sleeping, personal hygiene, dressing, etc.

Identifying which (if any) of these basic human functions has been affected (and by how much and for how long) should be the starting point in analyzing whether the injury affected the person's "general" (i.e., overall) ability to live his or her normal life. Under the second requirement of §3135(7), the impaired body function must be "important".

Once this inquiry is completed, specific activities can be examined. However, not all activities have the same significance in a person's overall life. For example, a person's ability to work is more important than the ability to play golf on weekends. Minor changes in how a person performs a specific activity do not change the fact that the person is still "generally" able to perform that activity.

While professing to look at multiple aspects of Plaintiff's life in this case, the Court of Appeals focused on Plaintiff's ability to work as a carpenter. From there, the Court broadly extrapolated that "[t]here can be no doubt that the inability to work affects home life and relations and creates and places monetary limits on daily and recreational activities". Kreiner, supra, 689. The Court of Appeals' concern for the monetary ramifications of work loss reflects an incomplete understanding of the No-Fault Act's compensation system.

As explained at pages 2-3, supra, an injured person can recover up to three years of no-fault benefits for work he/she would have performed but for the accident. MCL 500.3107(1)(b). If the person's work loss exceeds the monthly and/or three-year caps, those

excess economic losses can be recovered in a third-party lawsuit from the operator and/or owner of the vehicle at fault. MCL 500.3135(3)(c). The plaintiff does not have to establish that he/she sustained a serious impairment of body function in order to recover excess work loss. In short, the monetary aspects of work loss should not be considered in evaluating whether the plaintiff's "general" ability to lead his or her normal life has been affected.

Fourth, a bare comparison of the plaintiff's activities before and after the accident does not always yield the correct result. The "concert violinist" hypotheticals posed by the DiFranco Court demonstrate this point.

As a result of an auto accident, a concert violinist permanently loses the use of his legs. Nevertheless, he is still able to perform professionally from a wheelchair. His upper body strength is sufficient to allow him to bathe, dress, and perform other personal functions with little or no assistance. With modifications to his home and a specially equipped van (paid for through no-fault benefits), the violinist can perform many household tasks and drive wherever he wishes. Finally, the violinist continues to enjoy his prior "sedentary" recreational activities, e.g., reading, watching television, listening to music, and playing chess.

Since the violinist maintained his career, and continued many of his daily activities and hobbies after the accident, a simplistic "altered lifestyle" analysis would yield the conclusion that the violinist's paralysis did not affect his general ability to lead his normal life. Yet, everyone would intuitively agree that total permanent paralysis is a serious impairment of body function, regardless of how well the person has adjusted to that condition. The violinist should be able to sue for noneconomic damages. Why?

Another concert violinist injures his non-dominant hand in an auto accident. Although the initial injuries (i.e., a thumb fracture and some ligament damage) heal well with conservative treatment, there is a permanent loss of some dexterity and strength in the

hand. That impairment effectively ends the violinist's performing career, but only negligibly affects his ability to perform alternative work (e.g., teaching violin), household chores, etc.

The violinist becomes despondent. He refuses to look for alternative work, abandons his prior recreational activities, and sits at home all day watching television. This depression strains the violinist's marital relationship to the point of divorce.

A bare comparison of this violinist's pre- and post-accident activities would yield the conclusion that his lifestyle has radically changed. Yet, everyone would intuitively agree that a minor residual impairment of a non-dominant hand does not rise to the level of a serious impairment of body function. Why?

Reaching the proper result in both hypotheticals requires more than an "altered lifestyle" analysis. Section 3135(7) specifically requires that the impairment affect the person's "ability" to lead his or her normal life.

Since the word "ability" is not defined in the No-Fault Act, the following definition can be applied:

"1. the quality or state of being able : physical, mental or legal power to perform : competence in doing. . . .

"capacity, fitness, or tendency to act or be acted on in a (specified) way. . . ."

Webster's Third New Int'l Dictionary, supra, p 3.

This leads to the fifth proposed rule of law -- how should a person's "ability" to lead his or her normal life be evaluated? What a person's "abilities" (i.e., capabilities and capacities) are after an accident should be an objective inquiry. ACIA contends that the following non-exhaustive list of objective factors should be considered:

- 1) The nature and extent of the impairment;
- 2) The type and length of treatment required;

- 3) The duration of the impairment;
- 4) The extent of any residual impairment; and
- 5) The prognosis for eventual recovery.

These factors (in one form or another) have always played a pivotal role in determining whether a serious impairment of body function exists. They were first articulated by the Court of Appeals prior to this Court's decision in Cassidy. E.g., Hermann, 98 Mich App at 449-450. While the Cassidy Court did not formally adopt these factors, its discussion of the specific injuries at issue included such an analysis. Cassidy, supra, 503-506. In DiFranco, supra, 39-40, 67-68, this Court formally adopted similar factors, which were subsequently incorporated into standard jury instructions. SJ12d 36.01. Finally, these factors have been applied by the Court of Appeals in cases involving the current statutory definition of "serious impairment of body function". Miller, 246 Mich App at 248; Kern, 240 Mich App at 341.

The nature and extent of the injuries is an inquiry which is already required by §3135(2)(a). Under that section, courts initially must determine whether there is any dispute (or any material dispute) as to the nature and extent of the plaintiff's injuries before deciding whether the plaintiff has sustained a serious impairment of body function. Churchman v Rickerson, 240 Mich App 223, 232; 611 NW2d 333 (2000); May, 239 Mich App at 199.

A person's "ability" to lead his or her normal life often depends on what body function is impaired and the extent of that impairment. To paraphrase DiFranco, supra, 67, a 10% permanent reduction in brain function has a much greater effect on a person's ability to live his/her pre-accident life than a permanent 10% limitation in neck motion. A 75% limitation in back movement has a much greater effect than a 5% limitation.

The type and length of treatment required is also a relevant inquiry. Again paraphrasing DiFranco, supra, 68, an injury which requires surgery, several days of hospitaliza-

tion, and a lengthy course of rehabilitation markedly affects a person's ability to lead his/her pre-accident life. Conversely, an injury which improves significantly after one week of bed rest, and a two-month course of anti-inflammatories and pain medication, minimally interrupts a person's ability to continue living his/her normal life.

The duration of the impairment also must be considered. Again paraphrasing DiFranco, supra, a person who is rendered unconscious for several minutes immediately after an accident is completely unable to function during that timeframe. However, if there are no further problems, that temporary loss of consciousness does not affect the person's ability to live his/her normal life.

While §3135(7) does not require a permanent impairment, this Court has consistently recognized that a permanent impairment has a greater impact than a temporary one of like character. DiFranco, supra; Cassidy, supra, 505-506. However, a permanent impairment does not necessarily affect a person's general ability to lead his or her normal life -- the nature and extent of the impairment also must be considered. DiFranco, supra.

Finally, an inquiry into the extent of any residual impairment and the prognosis for eventual recovery looks at the long-term effects of the injury. All injuries require a certain amount of time to heal. If the healing process is normal, uneventful, short term, and complete, the plaintiff is able to continue his/her pre-accident life with little interruption.

Minor residual impairments may require some changes in how the plaintiff performs a particular activity. However, such accommodations often do not affect the plaintiff's overall ability to perform that activity. Conversely, a significant residual impairment that has little or no chance of being rectified may result in the plaintiff abandoning a significant aspect of his/her pre-accident life permanently, or for a substantial period of time.

The sixth proposed rule is based on numerous Cassidy-era decisions. The Court of Appeals repeatedly held that self-imposed restrictions on physical activities due to real or perceived pain are insufficient to establish that an impairment was "serious", or significantly affected the plaintiff's normal lifestyle. E.g., Bennett v Oakley, 153 Mich App 622, 631; 396 NW2d 451 (1986); Denson v Garrison, 145 Mich App 516, 520; 378 NW2d 532 (1985); Sherrell v Bugaski, 140 Mich App 708, 711; 364 NW2d 684 (1984); Flemings v Jenkins, 138 Mich App 788, 790; 360 NW2d 298 (1984).²¹

That holding has similar significance under §3135(7). If a physician does not impose restrictions on the plaintiff's activities, that fact indicates that the plaintiff has the physical "ability" to perform such activities. In many unpublished opinions, the Court of Appeals has held that self-imposed restrictions do not establish a "serious impairment of body function" under §3135(7). (See Appendix A).

However, the converse is not always true. A physician may impose restrictions which are too conservative. For example, a physician may advise the plaintiff to avoid lifting anything over 25 pounds. Nevertheless, the plaintiff is capable of lifting significantly more, and actually does so with little or no adverse consequences. Under §3135(7), the dispositive, objective inquiry is the plaintiff's actual "ability" to perform the activity at issue.

Application of the aforescribed rules of law now yields the appropriate results in the "concert violinist" hypotheticals.

The impairment sustained by the paralyzed violinist is total, permanent, and incapable of medical correction. That impairment prevents the violinist from performing two basic

²¹Cassidy-era decisions also held that self-imposed restrictions do not satisfy the requirement of a "objectively manifested injury". Denson, *supra*; Franz v Woods, 145 Mich App 169, 175, 178; 377 NW2d 373 (1985); Salim v Shepler, 142 Mich App 145, 149; 369 NW2d 282 (1985).

human functions -- walking and standing. While the violinist is able to continue his career, and perform many household and personal tasks, he must do so from a wheelchair -- a substantial physical accommodation. In short, the violinist's paralysis absolutely precludes him from resuming his pre-accident life in many significant ways. Accordingly, he should be able to sue for noneconomic damages.

Conversely, the violinist with the residual impairment of his non-dominant hand should not be allowed to recover noneconomic damages. The initial injuries (a thumb fracture and some ligament damage) were minor, and healed well with minimal medical treatment within a short period of time. Objectively, the residual impairment is also minor because there is only a minimal diminution of strength and dexterity. This violinist is physically able to perform all basic human functions. His refusal to resume his pre-accident activities, and to pursue an alternative career, are solely self-imposed.

This violinist's hand impairment did result in the premature termination of his performing career. However, any resulting loss of income is compensable through no-fault work loss benefits, plus a third-party lawsuit against the tortfeasor for any uncompensated loss.

In conclusion, the rules of law proposed by ACIA provide specific guidance to trial and appellate courts for resolving the "serious impairment" issue under a myriad of circumstances. These rules are consistent with the words chosen by the Legislature to define "serious impairment of body function" in §3135(7) -- an impairment which affects the person's general ability to lead his or her normal life. In addition, these rules effectuate the Legislature's intent to re-establish the "serious impairment" threshold as a significant obstacle to recovery of noneconomic damages.

II. EVEN WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THE EVIDENCE DOES NOT ESTABLISH THAT PLAINTIFF'S ALLEGED BACK INJURY AFFECTED HIS GENERAL ABILITY TO LEAD HIS NORMAL LIFE.

For purposes of this appeal only, ACIA will not dispute that Plaintiff's alleged injuries were objectively manifested, and that an important body function is at issue (i.e., the functioning of Plaintiff's back). There is a factual dispute as to the effect of Plaintiff's injuries on his ability to lead his pre-accident life.²² However, that dispute is not material to a determination of whether Plaintiff sustained a serious impairment of body function.

The Court of Appeals' opinions do not fully recount all of the relevant facts. ACIA (like Defendant) contends that even if the facts are as Plaintiff has alleged, his back injury never affected his "general" (i.e., overall) "ability" (i.e., physical capacity) to lead his normal life.

Plaintiff's & Dr. Fram's Deposition Testimony

For 11 to 12 years prior to the accident, Plaintiff worked as a self-employed carpenter. (25a, p 4). He was employed exclusively by homeowners, mostly for remodeling work. (Id.). Those jobs included building decks, roofing, siding, electrical work, plumbing, drywall, and some sheet metal and mechanical work. (25a, 4-5). Plaintiff generally worked 8 hours per day, and billed about \$18 per hour for his labor. (30a, pp 24-25; 33a, p 36).

The accident occurred about 6:30 p.m. on November 28, 1997 (the day after Thanksgiving). (26a, pp 7-8; 30a, pp 24-25). Plaintiff was driving a pickup truck and wearing a seatbelt. (26a-27a, pp 7, 13). Plaintiff did not feel injured immediately after the accident, and no ambulance was called to the scene. (28a, p 14).

²²For example, Defendant submitted a videotape to the trial court, which demonstrated that Plaintiff could perform strenuous physical activities with no apparent difficulty. (50a-51a).

The next morning, Plaintiff began experiencing some pain in his back and in his right leg. (28a, p 14). That pain started in his back, went into his hip "a little bit", and down into the back of his right calf. (28a, pp 14-15). As of his June 4, 1999 deposition, Plaintiff was still experiencing the same pain. (28a, p 15).

Plaintiff had previously planned not to work that Thanksgiving weekend. (30a, p 25). When he returned to work the next week, Plaintiff realized that he could not work as many hours because prolonged standing caused pain in his leg. (30a, p 24; 33a, p 34). Plaintiff maintained that since the accident, he was able to work only 6 hours per day. (30a-32a, pp 23-24, 29, 33). Plaintiff's income tax records indicate that his self-employment income remained consistent after the accident. (52a).

As to the effect of this injury on his ability to work, Plaintiff testified that "the only thing I am not doing any more is roofing." (29a, p 21; accord, 29a, p 20; 32a, pp 30-31). Plaintiff explained that he could no longer carry a bundle of shingles up a ladder, and could not tear off roofs because of the kneeling and bending involved. (29a, p 21; 32a, p 31). If a job involved roofing, Plaintiff asked for help from his stepson. (31a, pp 27-28).

Plaintiff also had to "watch" what he lifted, i.e., "anything much over 80 pounds". (29a, pp 20-21). Prior to the accident, Plaintiff could lift more than 80 pounds, but he did not do so regularly. (33a, p 35). If a job required lifting greater weights, Plaintiff now asked for assistance. (Id.).

In addition, Plaintiff had "a hard time" performing tasks that involved kneeling (e.g., trim work and installing plugs). (29a-30a, pp 21, 23; 32a, p 32). Spending "a lot of time on the ladder" (i.e., 20 to 30 minutes) also caused pain in his back, hip and right leg. (30a, p 23; 32a, pp 31-32). Plaintiff "forced" himself to perform such work, however. (29a-30a,

pp 21, 23; 32a, p 31). Plaintiff was able to take long lunches to "get off my feet for awhile". (36a, p 36).

At the time of his deposition, Plaintiff was finishing a 1½-month job on a house. (31a, pp 28-29). That job involved plumbing, wiring and heating work. (Id.).

The only other aspect of Plaintiff's pre-accident life that was affected was his recreational hunting. (30a-31a, pp 23, 29). Prior to the accident, Plaintiff did "a lot" of deer and rabbit hunting, which involved "a lot" of walking. (30a, pp 22-23; 32a, pp 32-33). After the accident, Plaintiff could only walk about one-half mile before experiencing pain in his right hip and leg. (29a, p 20; 32a, p 33). When he experienced such pain, Plaintiff would sit down for awhile before continuing his walk. (29a, p 20).

Plaintiff gave up rabbit hunting after the accident. (30a, p 22; 32a, p 33). He continued hunting deer with a bow and a rifle. (30a, p 22). Walks to his deer blind were about 1/2 to 3/4 of a mile. (32a, p 33). During the 1998 deer season, Plaintiff shot a deer. (30a, p 22).

Plaintiff acknowledged that he did not do a lot of household chores before the accident, except cutting grass on his riding lawnmower. (31a-32a, pp 29-30). He was still able to perform that activity. (32a-33a, pp 30, 34). Plaintiff had never shoveled snow from his driveway because he and his wife had four-wheel drive pickup trucks. (33a, pp 34-35). Plaintiff continued shopping with his wife after the accident, and was able to do any chore she asked. (33a, p 34).

As to medical treatment, Plaintiff's initial visit to his regular physician (Dr. Madhu) was on December 2, 1997 (i.e., four days after the accident). (5a). Plaintiff complained of pain in his right leg that went into his hip. (Id.). Although there was some tenderness in the right hip area, Plaintiff's range of motion was normal. (Id.).

Plaintiff saw Dr. Madhu on three additional occasions through January 1998. (6a-8a). During this timeframe, Plaintiff received cortisone injections and anti-inflammatory medication, and was advised to use a heating pad. (Id.).

On April 13, 1998, Plaintiff went to Karim M. Fram, M.D. (a neurologist). (9a-10a; 36a, p 4; 38a, pp 12-13). Right straight leg testing triggered pain in Plaintiff's right hip at 65 degrees. (39a, p 15). The only positive finding during an EMG study was a mild irritation of the right L4 nerve root, which was causing radiculopathy (i.e., a malfunction of the nerve root). (39a-40a, pp 16, 18-19). Dr. Fram recommended Motrin to control pain and inflammation, and prescribed a muscle relaxer (Flexeril). (40a, p 19). Plaintiff was advised to perform muscle strengthening exercises for his back and legs, and to walk. (Id.).

A lumbar MRI performed on April 17, 2003, revealed a grade 1 to grade 2 spondylo-
listhesis (i.e., arthritic changes) between L5-S1, and degenerative disc disease at L3-L4, L4-L5, and L5-S1. (11a; 40a, pp 19-21). There was no evidence of lateralizing disc herniation. (11a). Dr. Fram's resulting diagnosis was lower back pain secondary to lumbar strain, L4 radiculopathy, and degenerative disc disease. (41a, p 22). Dr. Fram believed that the auto accident either caused or aggravated those conditions. (42a-43a, pp 29-30).

During Plaintiff's second visit on May 12, 1998, Dr. Fram administered a steroidal nerve block to relieve the pain, swelling and inflammation in Plaintiff's lumbar back. (40a-41a, pp 21-22). Plaintiff was prescribed pain medication (Ultram), and advised to continue daily walks and strengthening exercises. (41a, p 22).

During his next visit on August 10, 1998, Plaintiff reported no improvement in his pain. (14a; 41a, pp 22-23). Dr. Fram's diagnosis remained the same, and Plaintiff's prescription for Ultram was continued. (14a; 41a, pp 23-24).

Dr. Fram also prescribed a three-week course of physical therapy, three times per week. (14a; 29a, pp 18-19; 41a, p 24). That therapy included heat, ultrasound and massage to strengthen Plaintiff's back muscles, improve spinal mobility, and reduce pain. (41a, p 24). Plaintiff reported that physical therapy did not help and, in some respects, made his pain worse. (29a, p 19; 41a, p 24).

Dr. Fram's diagnosis remained the same after he re-examined Plaintiff on October 9, 1998. (15a; 41a, pp 24-25). Since Plaintiff had not responded to prior medication, Dr. Fram prescribed a non-steroidal anti-inflammatory (Relafin). (15a; 41a, p 25). Plaintiff was advised to continue exercising 15 to 20 minutes per day. (41a, p 26).

At the time of his deposition, Plaintiff was no longer treating with any physician, and had stopped taking medication in December 1998. (28a-29a, pp 17, 19). When he experienced continuing pain after work, Plaintiff would rest his legs and back by "simply sit[ting] on the couch and keep[ing] my feet on the floor." (32a, p 32). Usually, the pain would be gone by morning. (Id.).

On August 6, 1999 (i.e., about three weeks before Dr. Fram's deposition), Plaintiff was re-examined by Dr. Fram. (34a; 42a, pp 26, 28). Plaintiff's complaints, and Dr. Fram's diagnosis, remained the same. (34a; 42a, pp 26-27). Dr. Fram now advised Plaintiff to wear a lumbar back support during his daily activities. (34a; 42a, p 27). Plaintiff was further advised to continue his back exercises, avoid lifting over 15 pounds, avoid excessive bending and twisting, and limit driving to 45 to 60 minutes at a time. (34a; 42a-44a, pp 27-28, 32, 36-37). Dr. Fram prescribed a different muscle relaxer (Skelaxin). (34a; 42a, p 28).

Dr. Fram believed that the degenerative changes in Plaintiff's spine were permanent, but the L4 radiculopathy might heal over time. (43a-44a, pp 31, 37). Future medical

treatment probably would entail doctor visits at least four times per year, muscle relaxants, and possible repeat EMG and MRI studies. (43a-44a, pp 32, 35-36).

Dr. Fram described Plaintiff's prognosis as "fair to good", i.e., "there will be limitations in his work and his activity for the rest of his life." (43a, pp 31-32). He described Plaintiff's medical condition as "significant" because of Plaintiff's age at the time of the accident (34 years old), and the physical limitations involved. (44a, p 35). However, Dr. Fram refused to characterize Plaintiff's condition as "serious":

"Q Doctor, would you state this his condition is a serious medical condition or an aggravating condition? What would you call it?

"A Well, I would not like to use a term, you know, serious or very serious. . . . Serious, meaning, you know, it will compromise his life?
No."

(44a, p 35) (emphasis added).

Analysis

To determine whether Plaintiff's "general" ability to lead his pre-accident life was affected, all of Plaintiff's functional abilities and activities must be examined. As the trial court correctly observed, Plaintiff is still able to perform all basic human functions, including lifting, bending, twisting, standing, and walking. (Motion Tr, 10). While Plaintiff allegedly cannot function as he once did due to pain, he has accommodated his limitations with only minimal lifestyle changes.

For example, Plaintiff now uses a lumbar back support while he is working. If he has to lift over 80 pounds (which is still a considerable amount of weight), Plaintiff now asks for assistance. After working on a ladder for 20 to 30 minutes, or walking half a mile, Plaintiff takes a break. At the end of the day, Plaintiff sits on a couch with his legs on the floor to deal with any residual pain.

Plaintiff has discontinued only two specific activities in his life.

First, Plaintiff no longer does roofing work. However, Plaintiff's business involves many other facets of home remodeling, e.g., building decks, installing siding and drywall, electrical and plumbing work. Although certain positions allegedly produce pain (e.g., kneeling and standing on a ladder), Plaintiff is still able to work while in those positions.

The Court of Appeals focused on the fact that Plaintiff now works only 6 hours per day. Any substantiated loss of income from that reduced work schedule, or Plaintiff's inability to accept roofing jobs, is compensable through no-fault benefits²³ and a possible excess work loss claim against Defendant. Plaintiff's alleged work loss does not change the fact that overall, Plaintiff has been able to continue his pre-accident career as a self-employed carpenter.

Second, Plaintiff no longer hunts rabbits. However, Plaintiff has continued hunting his favorite prey -- deer -- both with a bow and a rifle. He successfully shot a deer the year after the accident. Discontinuing rabbit hunting clearly did not affect Plaintiff's overall ability to pursue his pre-accident life.

The activities which were never effected by the injury also bear mentioning. Plaintiff still performs the same household chores, e.g., cutting grass with his riding lawnmower and shopping with his wife. Besides roofing and rabbit hunting, Plaintiff could not identify any other activity that he can no longer perform.

In short, a comparison of Plaintiff's functional abilities and activities before and after the accident reveals that Plaintiff's ability to live his pre-accident life has been minimally

²³Marquis v Hartford Accident & Indemnity (After Remand), 444 Mich 638; 513 NW2d 799 (1994).

affected. Stated otherwise, Plaintiff's "general" ability to lead his normal life has not been affected.

An analysis of the objective factors for determining Plaintiff's post-accident "ability" to lead his normal life also supports the conclusion that Plaintiff did not sustain a serious impairment of body function.

Dr. Fram diagnosed the nature and extent of Plaintiff's injury as lower back pain secondary to lumbar strain, L4 radiculopathy, and degenerative disc disease in Plaintiff's lumbar spine. He never disabled Plaintiff from working or performing any other specific activity. Instead, Dr. Fram advised Plaintiff to avoid excessive bending and twisting, and limit driving to 45 to 60 minutes at a time.²⁴ Although Dr. Fram further advised Plaintiff to avoid lifting over 15 pounds, Plaintiff testified that he can and does lift far more than that without adverse consequences.

The medical treatment Plaintiff received was conservative and minimal. Plaintiff did not feel injured immediately after the accident, and did not seek treatment until four days later. During the ensuing month, Plaintiff saw his regular physician four times. He received cortisone injections and anti-inflammatory medication, and was advised to use a heating pad.

Nearly four months later, Plaintiff began treating with Dr. Fram. Plaintiff saw Dr. Fram four times over the next six months. He received various pain and anti-inflammatory medications, muscle relaxers, and one nerve block injection. Dr. Fram recommended daily home exercises and walks to strengthen Plaintiff's back and leg muscles.

²⁴There is no evidence in this record as to whether Plaintiff adhered to this driving restriction, or whether this restriction had any effect on Plaintiff's life.

In August and September 1998, Plaintiff underwent a short-term course of physical therapy, i.e., three times per week for three weeks. That therapy also involved conservative treatment, i.e., exercises, heat, ultrasound and massage.

Plaintiff discontinued taking all medication in December 1998. Between October 9, 1998 and August 6, 1999, Plaintiff did not see any physician for his continuing complaints.

On the latter date, Plaintiff was re-examined by Dr. Fram. The only changes in Dr. Fram's recommendations were that Plaintiff should wear a lumbar back support while working, avoid heavy lifting, and limit his driving. Dr. Fram never recommended surgery for Plaintiff's existing complaints.

As to the duration and extent of Plaintiff's residual impairment, and prognosis for eventual recovery, Dr. Fram testified that the degenerative changes in Plaintiff's lumbar spine are permanent. However, the L4 radiculopathy might heal over time. Dr. Fram envisioned that Plaintiff's future medical treatment would consist of periodic re-examinations, use of muscle relaxants, home exercises, and repeat diagnostic testing.

Dr. Fram described Plaintiff's medical condition as "significant", and his prognosis as "fair to good", because there would be permanent physical limitations. However, Dr. Fram refused to characterize Plaintiff's medical condition as "serious", i.e., a condition that would "compromise his life".

While Plaintiff allegedly has some permanent physical impairments and limitations, overall they are not significant. Plaintiff is still physically capable of performing, and does in fact perform, nearly all of his pre-accident activities. In short, Plaintiff's "ability" to lead his normal life has not been sufficiently altered to warrant the conclusion that he sustained a serious impairment of body function.

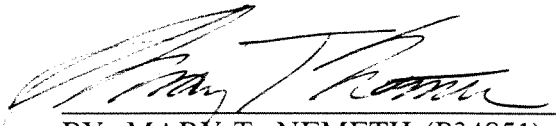
Accordingly, the trial court correctly concluded that Plaintiff's claim for noneconomic damages is barred, as a matter of law, by §3135(7). Defendant is entitled to summary disposition on that claim, pursuant to MCR 2.116(C)(10).

RELIEF

WHEREFORE, Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION (ACIA), respectfully requests this Honorable Court to:

- (1) ADOPT the rules of law proposed by ACIA for evaluating whether an impairment of body function "affects the person's general ability to lead his or her normal life", within the meaning of MCL 500.3135(7);
- (2) REVERSE the Court of Appeals' opinion on remand dated June 3, 2003; and
- (3) REINSTATE the Order for Summary Disposition Pursuant to MCR 2.116(C)(10), entered by the Lapeer County Circuit Court on February 9, 2000.

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Dated: January 20, 2004

APPELLATE DECISIONS INTERPRETING 1996 AMENDMENTS TO MCL 500.3135

REVISED 12/2/03

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>ALFARO V BECK</i> , UNPUBLISHED 239892 (9/9/03)	NECK PAIN & SPASM, AGGRAVATION OF PRE-EXISTING CERVICAL OSTEOARTHRITIS	SPASM	PHYSICAL THERAPY FOR 2 MONTHS	UNABLE TO LIFT, STAND, SIT OR WALK FOR EXTENDED PERIODS, ENGAGE IN SOCIAL ACTIVITIES, SEWING OR GARDENING	QUESTION OF FACT, AS TO WHETHER THE INJURY AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE.
<i>ARGUMENDO V COSSOU</i> , UNPUBLISHED 238465 (3/11/03)	FRACTURED FIFTH CARPAL BONE LEFT HAND (WRIST)	YES	PHYSICAL THERAPY, MEDICATION	HEALED AFTER 7 MONTHS BUT DEVELOPED BONE SPUR, CONTINUED PAIN AND SWELLING, NO FURTHER TREATMENT, ABLE TO DRIVE, TEND TO PERSONAL GROOMING WITH ASSISTANCE, UNABLE TO GRIP HEAVY OBJECTS, DO MANY HOUSEHOLD CHORES, USE KEYBOARD, LAWN MOWER, SEW, TIE SHOES, STRUGGLE TO OPEN BAG OF POTATO CHIPS	QUESTION OF FACT BASED ON PLAINTIFF'S DEPOSITION TESTIMONY, WHETHER ABILITY TO LEAD NORMAL LIFE HAS BEEN AFFECTED. JUSTICE KELLY DISSENTED AND POINTED OUT THAT FRACTURE HEALED AFTER 7 MONTHS WITH NO RESTRICTIONS BY DOCTOR. ALL LIMITATIONS WERE SELF-IMPOSED.
<i>ATCHISON V WAKEMAN</i> , UNPUBLISHED DOCKET 242205 (11/13/03)	NOT DISCUSSED, ASSUME NECK	NOT DISCUSSED	NOT DISCUSSED	UNABLE TO PERFORM FAMILIAL, RECREATIONAL, AND SEX ACTIVITIES. ADMITTED THAT HE COULD STILL HUNT, FISH, TAKE CARE OF CHILDREN, FATHERED TWO CHILDREN SINCE ACCIDENT	NO SERIOUS IMPAIRMENT PLAINTIFF'S GENERAL ABILITY TO LEAD HIS LIFE NOT AFFECTED. DISTINGUISHED FROM KREINER, PLAINTIFF ONLY WORKED FOR SIX MONTHS BEFORE ACCIDENT, WORK WAS NOT A SIGNIFICANT PART OF PLAINTIFF'S LIFE.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>BAHRI V GOTTIS</i> UNPUBLISHED OPINION DOCKET NO. 227913 DECIDED 2/22/02	NECK, BACK, DIZZINESS, HEADACHES, PANIC ATTACKS	QUESTION OF FACT	TREATMENT NOT DISCUSSED	VOLUNTARILY LIMITED GOING TO GYM, HOUSEWORK, TAKING CHILDREN OUT, BUT COULD DRIVE AND GO TO WORK AND OUT FOR SOCIAL OCCASIONS.	NO SERIOUS IMPAIRMENT INJURY DID NOT AFFECT ABILITY TO LEAD NORMAL LIFE
<i>BALMA V LEEP</i> UNPUBLISHED OPINION DOCKET NO. 234196 DECIDED 6/7/02	BACK	DOESN'T DISCUSS	PAIN MEDICATION ONLY	RESTRICTED WORK ACTIVITIES FOR A PERIOD OF TIME, BUT CURRENTLY HAD FULL RANGE OF MOTION OF THE BACK AND NO RESTRICTIONS	NO SERIOUS IMPAIRMENT, REVERSED JURY VERDICT IN FAVOR OF PLAINTIFF. NO MATERIAL FACTUAL DISPUTE, NO SERIOUS IMPAIRMENT AS A MATTER OF LAW, NO AFFECT ON NORMAL LIFE, APPLIED "KERN FACTORS"
<i>BESELER V LACY,</i> UNPUBLISHED OPINION DECIDED 7/9/02 (DOCKET NO. 223079)	NECK, BACK, KNEES	SPASM AND TRIGGER POINTS PER CHIROPRACTOR	ER VISIT, 6 WEEKS WITH FAMILY DOCTOR, 13 MOS. WITH CHIROPRACTOR	CAN'T DO BIKING, LAUNDRY, BATHE CHILDREN, WALKING, SITTING OR STANDING FOR LONG PERIODS, STRENUOUS ACTIVITIES, AT TRIAL COULD RIDE BIKE," ALMOST BACK TO NORMAL"	SERIOUS IMPAIRMENT, JURY VERDICT, \$0 IN DAMAGES AWARDED. ORDER FOR ADDITUR REVERSED. \$0 AWARD REINSTATED.
<i>BIESCZK V BAIN,</i> UNPUBLISHED OPINION DECIDED 10/25/02 (DOCKET NO. 233643)	DOUBLE INGUINAL HERNIA, AGGRAVATION OF DISC PROTRUSION IN THORACIC SPINE	YES, MYELOGRAM REVEALED DISC PROTRUSION IN THORACIC SPINE,	HERNIA SURGERY,	OFF WORK 3 WEEKS FOR HERNIA SURGERY, NO LIFTING OVER 20 LBS, NO TIME MISSED FROM WORK DUE TO BACK INJURY	NO SERIOUS IMPAIRMENT, QUESTION OF FACT AS TO NATURE AND EXTENT OF INJURIES BUT NOT MATERIAL TO ISSUE OF SERIOUS IMPAIRMENT, ACTIVITIES SEVERELY LIMITED PRIOR TO ACCIDENT, NORMAL LIFE NOT SIGNIFICANTLY ALTERED AFTER ACCIDENT.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE	COURT HELD
BLATT V LYNN , UNPUBLISHED OPINION DECIDED 6/22/99 (DOCKET NO. 209686)	NECK, SHOULDER, AND BACK PAIN, PANIC ATTACKS	NONE EXCEPT SHOULDER SEPARATION DIAGNOSED 1 YEAR AFTER ACCIDENT	SPORADIC TREATMENT	CONTINUED FREQUENT ATTENDANCE AT GYM, GOOD EVALUATIONS RECEIVED AT WORK	NO SERIOUS IMPAIRMENT , INJURIES HAD A NEGLIGIBLE EFFECT ON ABILITY TO LEAD NORMAL LIFE
BLOCK V PAWLUK UNPUBLISHED OPINION DECIDED 1/4/02 DOCKET NO. 225124	MILD CLOSED HEAD INJURY, DEPRESSION, COGNITIVE DIFFICULTIES DIAGNOSED ONE YEAR AFTER ACCIDENT	YES	ANTI- DEPRESSANT DRUGS, COUNSELING, SPEECH THERAPY FOR SEVERAL MONTHS	REQUIRED A TUTOR BUT WAS ABLE TO GRADUATE FROM HIGH SCHOOL ON TIME. HELD SUMMER JOBS, PARTICIPATED IN ACTIVITIES, ENROLLED IN COLLEGE AND TOOK FULL TIME JOB.	NO SERIOUS IMPAIRMENT AFTER SHORT RECOVERY PERIOD, PLAINTIFF RESUMED HER NORMAL ACTIVITIES. ABILITY TO LEAD NORMAL LIFE NOT ALTERED SIGNIFICANTLY. NO QUESTION OF FACT ON CLOSED HEAD INJURY SINCE DOCTOR DID NOT REGULARLY DIAGNOSE AND TREAT CHI'S.
BROWN V VAN NOLF UNPUBLISHED DOCKET NO. 242628 (11/20/03)	NECK PAIN AND SPASM	YES, SPASM	FAMILY DOCTOR AND SEVERAL SPECIALISTS, PAIN RESOLVED WITHIN 1 YEAR	RESTRICTED DUE TO NON- RELATED BACK PAIN. UNABLE TO DO HEAVY HOUSEHOLD CHORES OR CERTAIN ACTIVITIES WITH CHILDREN	NO SERIOUS IMPAIRMENT , OBJECTIVE INJURY OF IMPORTANT BODY FUNCTION, BUT NO EVIDENCE OF AFFECT ON GENERAL ABILITY TO LEAD HER LIFE CAUSED BY INJURY FROM ACCIDENT
BUDNITSKAYA V DREHER , UNPUBLISHED U.S. DISTRICT COURT, E.D. MICH, 1/21/98 (DOCKET NO. 97- 92192)	FRACTURED STERNUM, ACUTE CERVICAL STRAIN, CLOSED HEAD INJURY	NEGATIVE X-RAYS, & CT SCAN, NORMAL EMG, FX STERNUM 17 MONTHS AFTER DOL	COMPLAINTS OF PAIN, 2 SIX WEEK COURSES PHYSICAL THERAPY	1 WEEK OFF WORK, UNABLE TO DO CHORES OR CARE FOR CHILDREN 3-4 MONTHS, ABLE TO DRIVE, TAKE VACATION	NO SERIOUS IMPAIRMENT , NO EVIDENCE AS TO HOW IMPAIRMENT AFFECTED GENERAL ABILITY TO LEAD NORMAL LIFE

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
BURCHART V WARNER UNPUBLISHED OPINION DOCKET NO. 239205 (10/2/03)	WRISTS, KNEES, LEFT HIP, SHOULDER, LOW BACK, HEADACHES	MRI SHOWED MINIMAL JOINT EFFUSION OF RIGHT KNEE, DEGENERATIVE CHANGES OF LOW BACK AND DOWNSLOPING ACROMIUM PROCESS OF LEFT SHOULDER	NOT DISCUSSED	RETURNED TO WORK FULL TIME, UNABLE TO PARTICIPATE IN GARDENING, ROLLER BLADING, CANOEING, BICYCLING, SKIING, VOLLEYBALL, SEX WITH HUSBAND, MAY DELAY GETTING PREGNANT	QUESTION OF FACT IF GENERAL ABILITY TO LEAD HER NORMAL LIFE AFFECTED. ALTHOUGH ABLE TO RETURN TO WORK, FOCUS MUST BE ON MULTIPLE FACETS OF PERSON'S LIFE. REMANDED TO DETERMINE FREQUENCY OF RECREATIONAL ACTIVITIES. COURT SHOULD COMPARE LIFESTYLE BEFORE AND AFTER ACCIDENT.
CHANG V WESTFIELD INSURANCE, UNPUBLISHED OPINION OF THE COURT OF APPEALS, DECIDED 10/25/02 (DOCKET NO. 234507)	NECK TENDERNESS, LOW BACK, S1 RADICULOPATHY	EMG REVEALED S1 RADICULOPATHY MORE THAN ONE YEAR AFTER ACCIDENT	MASSAGE THERAPY, DR. STEFAN GLOWACKI DX POST TRAUMATIC CEPHALGIA AND CERVICAL SPINE SPONDYLITIS	ONE WEEK OFF OF WORK. PL TESTIFIED SHE WAS ABLE TO LEAD HER NORMAL LIFE AT HOME AND WORK.	NO SERIOUS IMPAIRMENT, DR. GLOWACKI ONLY DOCTOR TO FIND CERVICAL PROBLEM, DOES NOT RISE TO LEVEL OF SERIOUS IMPAIRMENT, OBJECTIVE FINDING 1 YEAR AFTER ACCIDENT OF S1 RADICULOPATHY UNRELATED TO CAR ACCIDENT WHERE PL ONLY COMPLAINED OF NECK PAIN
CHURCHMAN V RICKERSON, 240 MICH APP 223 (3/17/00)	CLOSED HEAD INJURY	DX - POST TRAUMATIC STRESS DISORDER WITH CLOSED HEAD INJURY AND TRAUMATIC BRAIN INJURY	LARAN LERNER		REMANDED FOR FACTUAL FINDINGS, CLOSED HEAD EXCEPTION IN STATUTE REQUIRES "SERIOUS" NEUROLOGICAL INJURY

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
CORDER V LUCERO UNPUBLISHED OPINION DECIDED 7/30/02 (DOCKET NO. 231656)	HEADACHE, NECK, BACK, SHOULDER, MEMORY LOSS, NUMBNESS IN HAND	MRI, CT SCAN & EMG ALL NORMAL EXCEPT FOR PRE- EXISTING CARPAL TUNNEL SYNDROME	ER TREATMENT, NUEROPSYCH TESTING, SUBSEQUENT TREATMENT NOT DISCUSSED.	2 DAYS OFF WORK, ABLE TO WORK 40 HOURS, ABLE TO PERFORM HOUSEHOLD CHORES, ABLE TO PERFORM AEROBIC EXERCISE SEVERAL TIMES PER WEEK, CANNOT PLANT FLOWERS BUT CAN PULL WEEDS AND CUT GRASS.	NO SERIOUS IMPAIRMENT ABILITY TO LEAD NORMAL LIFE NOT SIGNIFICANTLY ALTERED. SOFT TISSUE INJURIES THAT DO NOT LIMIT RANGE OF MOTION CANNOT BE A SERIOUS IMPAIRMENT AS A MATTER OF LAW.
CUTTLE V BARE UNPUBLISHED OPINION DOCKET NO. 234184 (11/15/02)	TMJ, NECK, SHOULDER	XRAYS AND MRI OF NECK NORMAL, TMJ DEMONSTRATED OBJECTIVELY ONE YEAR AFTER ACCIDENT	PHYSICAL THERAPY	DIFFICULTY EATING, MIGRAINE HEADACHES	NO SERIOUS IMPAIRMENT , TREATING DENTIST COULD NOT RELATE TMJ TO ACCIDENT, ANOTHER EXPERT OPINED TMJ CAUSED BY ACCIDENT. HOWEVER, THIS TESTIMONY NOT ADMISSIBLE SINCE EXPERT NOT ON WITNESS LIST. NO ADMISSIBLE EVIDENCE TO CREATE AN ISSUE OF FACT.
DAVEY V STARR UNPUBLISHED DOCKET NO. 237235 (6/17/03)	NECK, HERNIATED DISC AT C5-6, PRE- EXISTING NECK INJURY AGGRAVATED	YES, DISC SEEN ON MRI	NOT DISCUSSED	DID NOT WORK SINCE 1992. SINCE ACCIDENT UNABLE TO HELP SISTER REMODELHOUSE, TAKE CARE OF HORSES, DO FARM WORK, HAVE RELATIONS WITH HUSBAND, FIX HER HAIR, LIFT BAILS OF HAY, RIDE HORSES, GET IN AND OUT OF CAR.	SERIOUS IMPAIRMENT , DENIAL OF DIRECTED VERDICT AFFIRMED. EVIDENCE OF OBJECTIVELY MANIFESTED INJURY THAT AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD NORMAL LIFE. ALL ACTIVITIES CONSIDERED, NOT JUST EMPLOYMENT.
DAVISON V GEERING UNPUBLISHED 4/19/02 (DOCKET NO. 228902)	MID BACK	NO	TREATMENT NOT DISCUSSED	DECREASED RANGE OF MOTION AND PAIN WITH TWISTING AND BENDING	NO SERIOUS IMPAIRMENT , NO EVIDENCE OF OBJECTIVE MANIFESTATION OF INJURY.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
DAVIS V COLE UNPUBLISHED OPINION DECIDED 11/30/01 (DOCKET NO. 22621)	NECK AND SHOULDER	DOCTORS DISAGREED, QUESTION OF FACT	UNDERWENT SHOULDER SURGERY	ABLE TO RETURN TO WORK BUT RETIRED FROM WORK 2 YEARS AFTER ACCIDENT DUE TO PAIN, UNABLE TO PERFORM TASKS AROUND FAMILY FARM. DOCTOR TESTIFIED THAT ABILITY TO LEAD NORMAL LIFE WAS NOT AFFECTED.	NO SERIOUS IMPAIRMENT AS A RESULT OF SUBJECT ACCIDENT. JURY VERDICT OF NCA AFFIRMED. TRIAL COURT PROPERLY FOUND THAT THERE WAS A QUESTION OF FACT REGARDING THE NATURE AND EXTENT OF PLAINTIFF'S INJURIES AND QUESTION OF SERIOUS IMPAIRMENT PROPERLY WENT TO THE JURY.
DUDLEY V BLAZEFF, UNPUBLISHED DOCKET NO. 239078 (3/20/03)	SHOULDER IMPINGEMENT, SWELLING INFLAMMATION	XRAYS AND MRI NORMAL, LIMITED RANGE OF MOTION	NOT DISCUSSED	NOT DISCUSSED	NO SERIOUS IMPAIRMENT , NO OBJECTIVE MANIFESTATION OF INJURY, NO EVIDENCE THAT RANGE OF MOTION LIMITED ON PASSIVE EXAMS, WHICH COULD BE CONSIDERED OBJECTIVE MANIFESTATION. INJURIES NOT PAIN, MUST BE OBJECTIVELY MANIFESTED
FORD V WARMACK UNPUBLISHED OPINION DECIDED 4/26/02 (DOCKET NO. 229882)	PREEXISTING BACK PAIN, BULGING DISCS AND NERVE DAMAGE	YES, BUT NO EVIDENCE RELATED TO AUTO ACCIDENT	PHYSICAL THERAPY	LIFESTYLE SEVERELY RESTRICTED PRIOR TO ACCIDENT AS WELL AS AFTER.	NO SERIOUS IMPAIRMENT , NO EVIDENCE INJURY CAUSED BY ACCIDENT, NO CHANGE IN LIFESTYLE. WHATEVER INJURIES SUFFERED, THEY DID NOT AFFECT ABILITY TO LEAD NORMAL LIFE.
FRANCIS V ALEXANDER, UNPUBLISHED 237406 (5/29/03)	FRACTURED HIP	YES	NOT DISCUSSED	BED-BOUND FOR SEVERAL DAYS, ON CRUTCHES FOR WEEKS, EXTREME PAIN FOR 6 WEEKS, AFTER 8 MOS UNABLE TO WALK LONG DISTANCES, EXERCISE, RETURNED TO WORK AFTER 6 DAYS,	QUESTION OF FACT , SD FOR DEF REVERSED. INJURY NEED NOT BE PERMANENT TO BE SERIOUS.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>FRENCH V MURPHY</i> , UNPUBLISHED OPINION DECIDED 5/12/00 (DOCKET NO. 214655)	NECK, BACK, HIP, ARM, HEADACHES	SMALL CERVICAL DISC HERNIATION SEEN ON MRI, NEGATIVE EMG, XRAYS NEGATIVE	PHYSICAL THERAPY, MUSCLE RELAXANTS, EXERCISE	DIFFICULTY TAKING CARE OF CHILDREN AND CHORES, JOB AS SUPERVISOR FOR GROUP HOME FOR MENTALLY ILL NOT AFFECTED, LIMITED ONLY BY OWN COMPLAINTS OF PAIN	NO SERIOUS IMPAIRMENT, INJURIES CONSISTENTLY DESCRIBED AS "MILD"
<i>GIARDI V SOPOLIGA</i> UNPUBLISHED OPINION DECIDED 11/20/01 DOCKET NO. 224150	WHIPLASH HERNIATED DISCS IN NECK AND BACK, QUESTION IF RELATED TO SUBJECT AUTO ACCIDENT	YES	ER TREATMENT, PAIN MEDICATION. MORE TREATMENT AFTER SECOND ACCIDENT WHERE HERNIATED DISCS WERE DISCOVERED	ACTIVITIES NOT RESTRICTED EXCEPT FOR BOWLING, COULD DO HOUSEWORK WITH DIFFICULTY	NO SERIOUS IMPAIRMENT, AS A RESULT OF SUBJECT ACCIDENT. JURY VERDICT OF NCA AFFIRMED. INJURY DID NOT SIGNIFICANTLY AFFECT ABILITY TO LEAD NORMAL LIFE.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>HALLAL V FREELS</i> UNPUBLISHED OPINION DOCKET NO. 228312 DECIDED 2/26/02	LEG AND BACK PAIN	YES	TREATMENT NOT DISCUSSED	NOT MEDICALLY RESTRICTED FROM WORK, BUT HAD TO MISS TIME AND TAKE LONGER BREAKS BECAUSE OF PAIN, CAN'T DANCE AS MUCH, HOUSEHOLD TASKS, CHANGED SLEEP POSTURE AND WEIGHT GAIN	NO SERIOUS IMPAIRMENT EVIDENCE ESTABLISHED AN OBJECTIVE MANIFESTATION OF AN IMPORTANT BODY FUNCTION BUT DID NOT AFFECT PLAINTIFF'S LIFESTYLE. ONLY MINOR LIFESTYLE CHANGES NOT SUFFICIENT FOR QUESTION OF FACT AS TO SERIOUS IMPAIRMENT
<i>HAREN V BRABBS</i> , UNPUBLISHED OPINION DECIDED 6/6/00 (DOCKET NO. 217522)	LACERATION TO BACK OF HEAD, CONCUSSION, SPRAIN TO RIGHT KNEE	OBJECTIVE MANIFESTATION PER TRIAL COURT	8 STITCHES,	ABLE TO RUN, PLAY BASEBALL	NO SERIOUS IMPAIRMENT , IMPAIRMENT DID NOT AFFECT LIFESTYLE
<i>HERDUS V RAFFENBERGER</i> , UNPUBLISHED OPINION DECIDED 11/17/00 (DOCKET NO. 219378)	FACIAL SWELLING, DROOPING LEFT EYELID, DIFFICULTY WITH VISION, PARALYSIS ABOVE LEFT EYE, HEADACHES	YES OBJECTIVE MANIFESTATION	SURGERY 5 MONTHS AFTER ACCIDENT FOR DROOPING EYELID AND SWELLING, STILL LEFT WITH SOME PARALYSIS ABOVE LEFT EYE.	ABLE TO DRIVE 450 MILES 7 TIMES PER YEAR AND TAKE CARE OF PERSONAL NEEDS, STOPPED SWIMMING, UNABLE TO GET UP ON ROOF	NO SERIOUS IMPAIRMENT , NO EVIDENCE OF RESTRICTIONS OTHER THAN SELF IMPOSED, NO AFFECT ON LIFESTYLE.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
HEWITT V BUCKLEY , UNPUBLISHED, DOCKET NO. 238211 (3/25/03)	FRACTURED WRIST & NOSE, PUNCTURED LUNG WITH PNEUMOTHORAX, LACERATED SPLEEN, SUBSEQUENT TORN LIGAMENT IN WRIST REQUIRING FUTURE SURGERY	YES	HOSPITALIZED 8 DAYS, CHEST TUBE, WRIST CASTED 6 WEEKS, SPLINTED AND PT FOR 6 MORE WEEKS, FUTURE ARTHROSCOPIC SURGERY ON WRIST OR ULNAR SHORTENING OSTEOTOMY	MISSSED 1 MONTH OF SCHOOL, RETURNED TO ALL ACTIVITIES INCLUDING BASKETBALL AND WORKING PART- TIME. ABLE TO WORK FULL TIME AS CARPENTER WITHOUT RESTRICTIONS	QUESTION OF FACT SD FOR DEFENDANT REVERSED. AMPLE EVIDENCE OF EXTENSIVE RESIDUAL IMPAIRMENT. INJURY NEED NOT BE PERMANENT TO BE SERIOUS. TRIAL COURT ERRED IN CONCLUDING ABILITY TO LEAD NORMAL LIFE WAS NOT AFFECTED.
HICKS V MUMIN , UNPUBLISHED OPINION DECIDED 1/12/01 (DOCKET NO. 214004)	LOSS OF GRIP STRENGTH IN NON-DOMINANT LEFT HAND, NECK PAIN	YES, OBJECTIVE MANIFESTATION	LOSS OF STRENGTH IN LEFT HAND, MILD NECK AND BACK PAIN	CAN DO MOST OF THE THINGS HE COULD DO PRIOR TO ACCIDENT.	NO SERIOUS IMPAIRMENT , LINGERING DIFFICULTIES DID NOT RISE TO LEVEL OF SERIOUS IMPAIRMENT THAT AFFECTED ABILITY TO LEAD NORMAL LIFE.
HICKS V TRAMMER , UNPUBLISHED OPINION DECIDED 1/30/01 (DOCKET NO. 217237)	NECK PAIN	MUSCLE SPASMS, NUMBNESS	COULDN'T MOVE NECK OR SLEEP WITHOUT INTERRUPTION	MISSSED ONE DAY OF WORK AND A HUNTING TRIP, ABLE TO DRIVE, LIFT, WORK, SHOP AND SAIL	NO SERIOUS IMPAIRMENT , INJURIES DID NOT AFFECT ABILITY TO LEAD NORMAL LIFE
HOFFMAN V DESPELDER UNPUBLISHED DOCKET NO. 238141 1/24/03	BILATERAL S1 RADICULOPATHY, HEADACHES, NECK AND BACK PAIN, POSSIBLE BULGING DISCS, CLOSED HEAD INJURY	S1 RADICULOPATHY	PHYSICAL THERAPY	NO TIME FROM WORK MISSSED, SELF-IMPOSED LIMITATIONS ON EXERCISE AND DANCING,	NO SERIOUS IMPAIRMENT , OBJECTIVE INJURY OF S1 RADICULOPATHY, BUT NO WORK MISSSED, LINGERING PAIN DOES NOT CREATE ISSUE OF FACT ON SERIOUS IMPAIRMENT, NO PHYSICIAN IMPOSED RESTRICTIONS, DR'S AFFIDAVIT OF NEURO INJURY UNTIMELY AND REJECTED.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>HOWITT V BILLINGS</i> FEED, UNPUBLISHED OPINION DECIDED 1/30/01 (DOCKET NO. 216738)	SOFTENING OF KNEE CARTILAGE AND DISLOCATION OF 2 CERVICAL VERTEBRAE	YES, OBJECTIVE MANIFESTATION	IMPAIRED ABILITY TO WALK	ABLE TO WORK AND DO EVERYTHING EXCEPT WALK FOR LONG PERIODS, SOME EXERCISE AND PARTICIPATE IN SOME SPORTS.	NO SERIOUS IMPAIRMENT, IMPAIRMENT DID NOT AFFECT ABILITY TO LEAD NORMAL LIFE.
<i>HUGHEY V AMARAL</i> UNPUBLISHED OPINION DECIDED 4/12/02 (DOCKET NO. 228650)	BILATERAL CARPAL TUNNEL SYNDROME, CERVICAL RADICULOPATHY	NOT DISCUSSED	NOT DISCUSSED	ABLE TO RETURN TO SAME JOB DUTIES, DAUGHTER DID HOUSEHOLD CHORES, ABLE TO CONTINUE WITH RECREATIONAL ACTIVITIES.	NO SERIOUS IMPAIRMENT. ABILITY TO LEAD NORMAL LIFE NOT AFFECTED SIGNIFICANTLY.

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<i>JACKSON V NELSON</i> MICH APP (8/27/02) (DOCKET NO. 227759)	NOT DISCUSSED	NOT DISCUSSED	NOT DISCUSSED	NOT DISCUSSED	REVERSED SERIOUS IMPAIRMENT VERDICT AND REMANDED FOR NEW TRIAL. SJ2d 36.11 ACCURATELY STATES LAW REGARDING OBJECTIVELY MANIFESTED IMPAIRMENT. IN ORDER FOR AN IMPAIRMENT TO BE OBJECTIVELY MANIFESTED, THERE MUST BE A MEDICALLY IDENTIFIABLE INJURY OR CONDITION THAT HAS A PHYSICAL BASIS, PER <u>CASSIDY</u> AND <u>DIFRANCO</u> .
<i>KASEM V JAMESON</i> UNPUBLISHED ORDER OF THE COURT OF APPEALS DOCKET NO 246099 4/15/03	NOT DISCUSSED, PROBABLY BACK PAIN	UNKNOWN	UNKNOWN	PAIN PREVENTED FROM PLAYING RAQUETBALL AND JOGGING, COULD NOT VISIT GYM OR PARTICIPATE IN CERTAIN RECREATIONAL ACTIVITIES AS MUCH	NO SERIOUS IMPAIRMENT, LIFESTYLE CHANGES DO NOT RISE TO THE LEVEL OF A SIGNIFICANT ALTERATION OF PRE-ACCIDENT LIFESTYLE. ABILITY TO LEAD HIS NORMAL LIFE NOT AFFECTED
<i>KELLER V LEJA</i> , UNPUBLISHED OPINION DECIDED 8/21/01 (DOCKET NO. 222589)	THORACIC SPRAIN	XRAYS AND MRI SHOWED NO ABNORMALITY, COMPLAINT OF TENDERNESS	PHYSICAL THERAPY, PAIN MEDICATION	FULL RANGE OF MOTION AND NO SIGNIFICANT PAIN WITHIN 4 MONTHS, ABLE TO TAKE CARE OF 2 YOUNG CHILDREN AND PERFORM REGULAR DAILY ACTIVITIES	NO SERIOUS IMPAIRMENT, TENDERNESS IS A SUBJECTIVE COMPLAINT, MINIMAL TREATMENT AND FAVORABLE PROGNOSIS FOR FULL RECOVERY, NO EVIDENCE OF OBJECTIVELY MANIFESTED INJURY, LIFESTYLE NOT AFFECTED.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>KERN V BLETHEN- COLONI</i> , 240 MICH APP 333 (3/24/00)	COMMUNUTED FEMUR FRACTURE	YES, FRACTURE	6 DAYS HOSPITAL INPATIENT, EXTERNAL FIXATOR WORN 11 WEEKS, SUBSEQUENT SURGERY TO REMOVE PINS	UNABLE TO WALK FOR 3 MONTHS	SERIOUS IMPAIRMENT AS MATTER OF LAW BASED ON SERIOUSNESS OF INITIAL INJURY, TREATMENT REQUIRED AND DURATION OF DISABILITY

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
KREINER V FISCHER ____ MICH APP ____ (6/3/03) (DOCKET NO. 225640)	LUMBAR RADICULOPATHY, SPONDYLOLYSIS, DEGENERATIVE DISC DISEASE, SCIATIC NERVE IRRITATION OF RIGHT LEG	YES, MRI AND EMG SHOWED DEGENERATION IN DISCS AND RADICULOPATHY	PHYSICAL THERAPY, NERVE BLOCK INJECTIONS, PAIN MEDICATION	COULD WORK ONLY 6 HRS A DAY AS A CARPENTER, COULD NO LONGER DO ROOFING WORK, COULD ONLY BE ON LADDER 20 MINUTES AT A TIME, COULD NOT LIFT MORE THAN 80 LBS, COULD NOT WALK MORE THAN ½ A MILE AND COULD NOT PARTICIPATE IN RECREATION HUNTING.	REV SD FOR DEFENDANT. ANY EFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE IS NOT SUFFICIENT. HOWEVER, AN INJURY AFFECTING ONE'S EMPLOYMENT, WHERE THE JOB PLAYS A SIGNIFICANT ROLE IN THE PERSON'S LIFE, CAN BE EQUATED TO AFFECTING THE PERSON'S GENERAL ABILITY TO LEAD HIS NORMAL LIFE. REMANDED, IF NO FACTUAL DISPUTE ON EMPLOYMENT LIMITATIONS, PLAINTIFF HAS SUSTAINED A SERIOUS IMPAIRMENT AS A MATTER OF LAW.
KREINER V FISCHER ____ MICH ____ (4/9/03) (DOCKET NO.122115)	SEE BELOW	SEE BELOW	SEE BELOW	SEE BELOW	SUPREME COURT VACATED COURT OF APPEALS ORDER REVERSING SUMMARY DISPOSITION FOR DEFENDANT(SEE BELOW) AND REMANDED FOR CONSIDERATION OF WHETHER PLAINTIFF'S GENERAL ABILITY TO LEAD HIS NORMAL LIFE WAS AFFECTED BY THE IMPAIRMENT. ANY EFFECT IS NOT SUFFICIENT TO CREATE A SERIOUS IMPAIRMENT

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
KREINER V FISCHER, MICH APP (5/31/02) (DOCKET NO. 225640) This opinion was VACATED BY SUPREME COURT	LUMBAR RADICULOPATHY, SPONDYLOLYSIS, DEGENERATIVE DISC DISEASE, SCIATIC NERVE IRRITATION OF RIGHT LEG	YES, MRI AND EMG SHOWED DEGENERATION IN DISCS AND RADICULOPATHY	PHYSICAL THERAPY, NERVE BLOCK INJECTIONS, PAIN MEDICATION	COULD WORK ONLY 6 HRS A DAY AS A CARPENTER, COULD NO LONGER DO ROOFING WORK, COULD ONLY BE ON LADDER 20 MINUTES AT A TIME, COULD NOT LIFT MORE THAN 80 LBS, COULD NOT WALK MORE THAN ½ A MILE AND COULD NOT PARTICIPATE IN RECREATION HUNTING.	REV SD FOR DEF. THIRD PRONG OF SERIOUS IMPAIRMENT DEFINITION REQUIRES ONLY "AFFECT" ON NORMAL LIFE, NOT ADDITIONAL REQUIREMENT OF "SIGNIFICANT AFFECT." PLAINTIFF'S JOB AS A CARPENTER WAS NOT INSIGNIFICANT BUT WAS A PART OF HIS NORMAL LIFE AND WAS AFFECTED BY THE IMPAIRMENT. REMANDED TO DETERMINE IF QUESTION OF FACT, IF NONE, SERIOUS IMPAIRMENT AS A MATTER OF LAW.
LEDWIDGE V CANFIELD, UNPUBLISHED OPINION DECIDED 4/23/02 (DOCKET NO. 228490)	NECK	NOT MATERIAL	NECK BRACE, PHYSICAL THERAPY	SHORT LIVED DISABILITY	NO SERIOUS IMPAIRMENT PAIN OR RESIDUAL IMPAIRMENT DID NOT AFFECT PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
LOCKWOOD V WNUK , UNPUBLISHED 237088 (2/21/03)	TRAUMATIC BRAIN INJURY, ABDOMINAL INJURIES AND AGGRAVATION OF CROHN'S DISEASE, CERVICAL STRAIN, CONTUSIONS	NO	NUMEROUS DOCTORS, BULGE IN ABDOMEN RESULTING IN HERNIA SURGERY, NEUROPSYCH TREATMENT	QUIT JOB AS A SOCIAL WORKER, DIFFICULTY WITH TASKS AT HOME DUE TO COGNITIVE DEFICITS, NO DEPS TAKEN, AFFECT ON LIFE FROM COMMENTS IN MEDICAL RECORDS	NO SERIOUS IMPAIRMENT FOR NECK INJURY AND CONTUSIONS. QUESTION OF FACT FOR CHI AND ABDOMINAL INJURY, BASED ON DIAGNOSIS OF TRAUMATIC BRAIN INJURY AND DEFICITS AND QUESTION OF FACT WHETHER ILEOSTOMY LEAK CAUSED BY ACCIDENT.
LULLO V HEIKKILA , UNPUBLISHED OPINION DECIDED 7/10/01 (DOCKET NO. 226065)	BACK INJURIES	UNKNOWN	COMPLAINTS OF PAIN	CONTINUED SIMILAR ACTIVITIES AFTER ACCIDENT EXCEPT REDUCED ABILITY TO RUN AND LIMITATION ON CERTAIN TYPES OF EXERCISES	NO SERIOUS IMPAIRMENT, IMPAIRMENT DID NOT AFFECT GENERAL ABILITY TO LEAD A NORMAL LIFE
MASSEY V GARBACZ , UNPUBLISHED OPINION DECIDED 8/24/01 (DOCKET NO. 221577)	UNKNOWN	UNKNOWN	UNKNOWN	NOT ABLE TO PERFORM SOME ACTIVITIES	NO SERIOUS IMPAIRMENT, CAUSE OF PLAINTIFF'S INJURIES (AGE OR ACCIDENT) NOT MATERIAL TO DETERMINATION WHETHER SERIOUS IMPAIRMENT SUSTAINED, GENERAL ABILITY TO LEAD NORMAL LIFE UNAFFECTED.
MATTHEWS V TAHASH , UNPUBLISHED OPINION DECIDED 11/30/99 (DOCKET NO. 212350)	HEADACHES, BACK PAIN		2 MONTHS CHIROPRACTIC TREATMENT, NO RESTRICTIONS	ABLE TO ENGAGE IN WORK AND RECREATIONAL ACTIVITIES	NO SERIOUS IMPAIRMENT, LINGERING PAIN, BY ITSELF, DOES NOT CREATE A JURY QUESTION ON SI.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>MAY V SOMMERFIELD (AFTER REMAND), 240 MICH APP 504 (4/18/00)</i>	ARM	TRIAL COURT CHANGED INITIAL RULING AND FOUND NO OBJECTIVE MANIFESTATION OF INJURY	COMPLAINTS OF PAIN	NO AFFECT ON LIFESTYLE	NO SERIOUS IMPAIRMENT, TRIAL COURT PROPERLY COMPARED PLAINTIFF'S LIFESTYLE BEFORE AND AFTER THE ACCIDENT TO DETERMINE WHETHER PLAINTIFF SUSTAINED A SERIOUS IMPAIRMENT
<i>MAY V SOMMERFIELD, 239 MICH APP 199 (12/21/99) 1st PUBLISHED DECISION</i>	ARM	OBJECTIVELY MANIFESTED PER TRIAL COURT, VISIBLE INJURY TO ARM		ABLE TO DO ALL THE THINGS HE COULD DO BEFORE THE ACCIDENT, HOWEVER, WITH PAIN.	REMANDED FOR FACTUAL FINDINGS TO CONSIDER NATURE AND EXTENT OF INJURY
<i>MCCARTHY V STODDARD, UNPUBLISHED OPINION DECIDED 10/25/02 (DOCKET NO. 232884)</i>	OPINION DOESN'T SPECIFY, ASSUME BACK	YES	NOT DISCUSSED	ABLE TO TEACH WITH CHANGING POSITION FROM SITTING TO STANDING, ABLE TO DO MOST HOUSEHOLD TASKS, CAN'T DO AS MUCH LIFTING, DOESN'T STAND FOR EXTENDED PERIODS, ABLE TO DRIVE FOR LENGTHY PERIODS.	NO SERIOUS IMPAIRMENT, MINOR LIFESTYLE CHANGES FRUSTRATING BUT DO NOT ESTABLISH IMPAIRMENT AFFECTED GENERAL ABILITY TO LEAD HER NORMAL LIFE. APPROPRIATE TO COMPARE LIFESTYLE BEFORE AND AFTER ACCIDENT.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE	COURT HELD
<i>METIVIER V SCHUTT</i> , UNPUBLISHED OPINION DECIDED 7/31/01 (DOCKET NO. 216325)	NECK & BACK PAIN, TMJ	DISPLACEMENT OF RIGHT & LEFT TMJ DISC SEEN ON CAT SCAN, ABNORMAL MRI OF THE NECK SHOWED MILD DEGENERATIVE CHANGES, MILD DEGENERATIVE MARGINAL SPUR FORMATION, & DEHYDRATION AT VARIOUS DISC LEVELS	24 CHIRORACTIC TREATMENTS FROM 8/96 TO 12/96, PHYSICAL THERAPY FROM 12/96 TO 2/97, ORTHOTIC BITE APPLIANCE	RETURNED TO WORK WITHIN 3 ½ WEEKS, BUT NEEDED ASSISTANCE WITH HEAVY LIFTING, UNABLE TO EAT STEAK, UNABLE TO BIKE RIDE FOR 1 ½ YEARS DUE TO PAIN, ABLE NOW TO DO HOUSEHOLD CHORES	DV FOR DEFENDANT REVERSED. FACTUAL DISPUTE EXISTS, AMPLE TESTIMONY THAT PLAINTIFF'S NORMAL LIFESTYLE WAS SERIOUSLY AFFECTED BY THE OBJECTIVELY MANIFESTED INJURIES TO HIS NECK, JAW AND BACK.
<i>MILLER V ANDREWS</i> , UNPUBLISHED (DOCKET NO. 241948) (11/13/03)	NOT DISCUSSED, ASSUME NECK	NO	PHYSICAL THERAPY FOR ONE MONTH WITH REDUCTION OF PAIN	MISSED 8 DAYS OF WORK, TOOK PAY CUT TO FIND LESS PHYSICALLY DEMANDING JOB, DIFFICULTY WITH HOUSEHOLD CHORES, ALL RESTRICTIONS SELF IMPOSED	NO SERIOUS IMPAIRMENT ALL RESTRICTIONS WERE SELF IMPOSED, AFFIDAVIT OF DR STATES "SERIOUS IMPAIRMENT". CAN'T MAKE LEGAL CONCLUSION. NO EVIDENCE THAT "GENERAL" ABILITY WAS AFFECTED UNDER <u>KREINER</u> .
<i>MILLER V PURCELL</i> , 246 MICH APP 244 (6/1/01)	SHOULDER SEPARATION, MILD TENDONITIS		PHYSICAL THERAPY DAILY PAIN MEDICATION	ABLE TO WORK 40 HOURS PER WEEK AND PERFORM HOUSEHOLD TASKS, UNABLE TO KNIT AND HAD TO TYPE ONE- HANDED AT TIMES	NO SERIOUS IMPAIRMENT , EVEN ASSUMING OBJECTIVE MANIFESTATION, NO SIGNIFICANT AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE

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<i>MIRLING V CARELL</i> , UNPUBLISHED OPINION DECIDED 1/30/01 (DOCKET NO. 216843)	LOST TOOTH	YES OBJECTIVE MANIFESTATION	WORE TEMPORARY REPLACEMENT FOR 2 YEARS, THEN FITTED WITH PERMANENT REPLACEMENT.	INTERFERED WITH ABILITY TO EAT, FELT SELF-CONSCIOUS, RESTRICTED SPORTS TO PREVENT FURTHER INJURY	NO SERIOUS IMPAIRMENT, INJURY AFFECTED LIFE TO A LIMITED EXTENT, DID NOT SIGNIFICANTLY AFFECT LIFESTYLE
<i>MITCHELL V STEWART</i> , UNPUBLISHED OPINION DECIDED 6/30/00 (DOCKET NO. 215052)	LOW BACK PAIN	LARGE HEMATOMA OVER SPINE, POSITIVE STRAIGHT LEG RAISING		PAIN PREVENTED PARTICIPATION IN NORMAL ACTIVITIES	REMANDED FOR FACTUAL FINDINGS
<i>MITCHELL V STEWART (AFTER REMAND)</i> , UNPUBLISHED OPINION DECIDED 8/29/00 (DOCKET NO. 215052)	LOW BACK PAIN	LARGE HEMATOMA OVER SPINE, POSITIVE STRAIGHT LEG TESTING		PAIN PREVENTED PARTICIPATION IN NORMAL ACTIVITIES	SD FOR DEF REVERSED. PLAINTIFF ESTABLISHED AN OBJECTIVELY MANIFESTED INJURY UNDER <u>DIFRANCO</u>

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>MOORE V CLOUS</i> UNPUBLISHED OPINION DECIDED 12/21/01 DOCKET NO. 226289	BACK PAIN PRE-EXISTING LUMBAR RADICULOPATHY	PRE-EXISTING INJURY OBJECTIVELY MANIFESTED, NOT WORSENERD BY ACCIDENT.	FAMILY DOCTOR, NEUROSURGEON , PAIN MANAGEMENT CLINIC	NOT ALTERED	NO SERIOUS IMPAIRMENT OBJECTIVE INJURY MUST BE THE RESULT OF DEFENDANT'S NEGLIGENCE. NO MEDICAL EVIDENCE THAT BACK CONDITIONED WORSENERD AFTER THE ACCIDENT, LIFESTYLE NOT SIGNIFICANTLY ALTERED.
<i>NECHOVSKI V GUTT</i> UNPUBLISHED OPINION DECIDED 4/26/02 (DOCKET NO. 228668)	BACK PAIN	NO, NOTHING OBJECTIVE SEEN ON MRI, XRAY OR MAJORITY OF PHYSICIAN EXAMS, ONE ISOLATED FINDING OF TIGHTNESS IN BACK MUSCLES	TREATMENT WITH NUMEROUS PHYSICIANS	MISSED SOME SCHOOL BUT STILL GRADUATED 6 MONTHS LATE, SELF IMPOSED RESTRICTION OF NO SPORTS, BUT ABLE TO PARTICIPATE IN EVERYDAY ACTIVITIES, VOLUNTARILY QUIT WAITRESS JOB, NO EVIDENCE PHYSICALLY UNABLE TO WORK.	NO SERIOUS IMPAIRMENT. NO OBJECTIVE FINDINGS AND NO EFFECT ON LIFESTYLE
<i>OGDEN-SCHUETTE V IRENCE</i> , U.S. DISTRICT COURT, E.D. MICH, DECIDED 12/2/99 (DOCKET NO. 98-74393)	BRAIN INJURY, DEPRESSION, ANXIETY	BRAIN CT SCAN - SMALL CONTUSION IN BRAIN	NEUROLOGIST, NEUROPSYCHOL OGIST		QUESTION OF FACT AS TO NATURE AND EXTENT OF INJURIES

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>PATENGE V KNIGHT</i> UNPUBLISHED DOCKET NO. 238893 (3/11/03)	BACK, NECK, SHOULDER	YES	PAIN MEDICATION, POSSIBLE MAJOR BACK SURGERY	MISSES 2-3 DAYS OF WORK PER MONTH DUE TO PAIN, UNABLE TO DO HOUSEWORK, RIDE IN CAR FOR LONG PERIODS, UNABLE TO PARTICIPATE IN SNOWMOBILING, CROSS COUNTRY SKIING, BOWLING, CAMPING	QUESTION OF FACT CREATED BY PLAINTIFF'S TESTIMONY AS TO WHETHER INJURY AFFECTED HER NORMAL LIFE. JUSTICE KELLY DISSENTED AND POINTED OUT THAT NO DOCTOR RESTRICTED PLAINTIFF AND THE LIMITATIONS WERE SELF-IMPOSED.
<i>PAYNE V GILL</i> UNPUBLISHED OPINION DECIDED 4/5/02, (DOCKET NO. 224873)	KNEE	OBJECTIVE INJURY NOT DISCUSSED, DOCTOR TESTIFIED KNEES WERE 80 & 90 % RECOVERED	MOTRIN AT ER, 2 COURSES OF PHYSICAL THERAPY & CHIROPRACTIC	MISSED 2 DAYS OF WORK, ALLEGED RECREATIONAL ACTIVITIES LIMITED	NO SERIOUS IMPAIRED JURY VERDICT AFFIRMED. MINIMAL TREATMENT AND PLAINTIFF'S LIFESTYLE NOT SIGNIFICANTLY ALTERED. EVIDENCE TO SUPPORT JURY'S VERDICT.
<i>PEOPLES V HALTON,</i> <i>AFTER REMAND,</i> UNPUBLISHED OPINION DECIDED 11/20/01 (DOCKET NO. 220987)	CLOSED HEAD INJURY	UNKNOWN	UNKNOWN	UNKNOWN	QUESTION OF FACT. AFFIDAVIT OF PLAINTIFF'S TREATING DOCTOR INDICATING "SERIOUS NEUROLOGICAL INJURY" ESTABLISHED A QUESTION OF FACT
<i>PEOPLES V HALTON,</i> UNPUBLISHED OPINION DECIDED 7/6/01 (DOCKET NO. 220987	UNKNOWN	UNKNOWN	UNKNOWN	UNKNOWN	REMANDED. TRIAL COURT FAILED TO MAKE FINDINGS AS TO WHETHER FACTUAL DISPUTE EXISTS.
<i>PERALES V PARTIN,</i> UNPUBLISHED OPINION DECIDED 7/13/01 (DOCKET NO. 223343)	TENDONITIS	NO, FINDINGS ONLY OF TENDERNESS AND LIMITED FLEXION	COMPLAINTS OF PAIN	PAIN HAMPERED ABILITY TO STAND OR DRIVE FOR LONG PERIODS	NO SERIOUS IMPAIRMENT, INJURIES, MUST BE MEDICALLY SUBSTANTIATED THROUGH OBJECTIVE MANIFESTATION, SELF- IMPOSED LIMITATION DUE TO PAIN IS NOT OBJECTIVE MANIFESTATION

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PETTIE V BROCK, UNPUBLISHED DOCKET NO 238713 (2/28/03)	BULGING DISC IN LOWER SPINE, CLOSED HEAD INJURY	MRI SHOWED BULGING DISCS, EEG SHOWED ABNORMAL BRAIN FUNCTION	UNKNOWN	ABLE TO WORK, DRIVE, SOCIALIZE, TRAVEL, TAKE CARE OF HERSELF, CHILDREN, HOME, BUT SLEPT MORE, NEEDED HELP WITH HOUSEWORK AND BALANCING CHECKBOOK	NO SERIOUS IMPAIRMENT EVIDENCE DID NOT ESTABLISH SERIOUS INJURY, I.E., SIGNIFICANT IMPACT ON GENERAL ABILITY TO LIVE NORMAL LIFE. AFFIDAVIT TO ESTABLISH CLOSED HEAD INJURY NOT CONSIDERED WHEN OFFERED WITH MOTION FOR RECONSIDERATION AND NOT ORIGINAL MOTION.
PORCELLI V KIRCHNER, UNPUBLISHED DOCKET NO. 236822 (1/24/03)	NECK, RIGHT SHOULDER, FOREARM, KNEE	NO, ONLY MILD TENDERNESS	PAIN	COULD NO LONGER PERFORM HOUSEKEEPING JOB AT WORK	NO SERIOUS IMPAIRMENT, OVERWHELMING EVIDENCE THAT PLAINTIFF DID NOT SUSTAIN A SERIOUS INJURY AND NO EVIDENCE THAT GENERAL ABILITY TO LEAD LIFE SIGNIFICANTLY ALTERED. SUBSEQUENT KNEE INJURY NOT RELATED TO AUTO ACCIDENT

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RANDOLPH V GIVAN UNPUBLISHED OPINION DECIDED 9/3/02 (DOCKET NO. 233104)	NECK, UPPER BACK, CLOSED HEAD, SEIZURES	C7 SUBLUXATION SEEN ON XRAY, DX WITH PARTIAL SEIZURE	CHIROPRACTIC, DOESN'T DISCUSS TX FOR SEIZURE	CAN'T BEND, DO HEAVY LIFTING, DOESN'T SLEEP WELL, NEEDED ASSISTANCE WITH HOUSEWORK	QUESTION OF FACT ON CLOSED HEAD INJURY. DR AFFIDAVIT AVERRED PARTIAL SEIZURE MAY INDICATE SERIOUS NEUROLOGICAL INJURY. NO SERIOUS IMPAIRMENT ON SOFT TISSUE NECK INJURY, OBJECTIVE FINDINGS BUT NO EVIDENCE OF SIGNIFICANT IMPACT ON ABILITY TO LIVE NORMAL LIFE.
REAM V BURK ASPHALT PAVING, UNPUBLISHED 238824 (9/9/03)	EXTENSIVE SOFT TISSUE INJURY TO LOWER LEG AND FOOT, CONTUSION AND RUPTURE OF RIGHT BICEPS TENDON	YES	WALKING CAST FOR TWO MONTHS	OFF WORK FOR TWO MONTHS, CONTINUED PAIN AT WORK, UNABLE TO BOW HUNT, FISH, WALK ON UNEVEN TERRAIN	SERIOUS IMPAIRMENT AS A MATTER OF LAW. WORK WAS SIGNIFICANT IN PLAINTIFF'S LIFE. NORMAL LIFE AFFECTED BY IMMEDIATE AFFECTS OF ACCIDENT, PLUS CONTINUED EMPLOYMENT LIMITATIONS.
REED V YACKELL UNPUBLISHED DOCKET NO 236588 (2/14/03)	CLOSED HEAD INJURY, ARM CONTUSION	DR. GUNABALAN RELIED ON SPECT SCAN TO DX CHI	ER DX BUMP ON HEAD, LEFT ARM CONTUSION, NEUROPSYCH TESTING, WITH SEWICK, BLASE MINIMAL	NOT DISCUSSED, EXCEPT BY DRS, UNABLE TO MAINTAIN CONCENTRATION, PERFORM ACTIVITIES, CHANGE IN PERSONALITY MISSED TWO DAYS OF WORK, RETURNED TO WORK FULL TIME, STOPPED PLAYING GOLF FOR A TIME, RESUMED NORMAL ACTIVITIES TO A LESSER EXTENT	SI JURY VERDICT, \$1,256,320 AFFIRMED, VERDICT SUPPORTED BY MEDICAL EVIDENCE
REEKWALD V L.E. BEST TRANS, UNPUBLISHED DOCKET NO. 236802 (11/26/02)	HAND	YES			NO SERIOUS IMPAIRMENT INJURY DID NOT AFFECT PLAINTIFF'S ABILITY TO LEAD HIS NORMAL LIFE.

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REID V LEGHORN , UNPUBLISHED OPINION DECIDED 12/28/01 DOCKET NO. 224481	NECK AND BACK, PSYCHOLOGICAL	DISC HERNIATION SEEN ON MRI.	CHIROPRACTIC	DISPUTED EVIDENCE REGARDING PLAINTIFF'S ABILITY TO FUNCTION	NO SERIOUS IMPAIRMENT JURY VERDICT AFFIRMED, PLAINTIFF'S DOCTORS LACKED CREDIBILITY AND DEFENSE DOCTORS FOUND SOFT TISSUE INJURIES THAT WERE NOT DISABLING.
RIVERA V LOYE , UNPUBLISHED OPINION DECIDED 5/20/03 DOCKET NO. 236212	DEPRESSION	NO	18 MONTHS AFTER ACCIDENT 7 VISITS TO DOCTOR, ANTI- DEPRESSANTS	NOT DISCUSSED, ALLEGEDLY COLLECTING SS DISABILITY FOR DEPRESSION	NO SERIOUS IMPAIRMENT , REVERSED TRIAL COURT'S DENIAL OF SD FOR DEF. NO DOCUMENTARY EVIDENCE OF DISABILITY, NOT MUCH TREATMENT, NOT SERIOUS PER KERN FACTORS,
ROSLONIEC V BROUILLETTE UNPUBLISHED 240245 (9/16/03)	CERVICAL STRAIN WITH SPASMS, LEFT ROTATOR CUFF STRAIN WITH IMPINGEMENT AND LIMITED RANGE OF MOTION	SPASM AND LIMITED RANGE OF MOTION, EMG AND XRAY'S NORMAL	PHYSICAL THERAPY, MEDICATION	SPASM RESOLVED WITHIN 3 MONTHS, RETURNED TO WORK IN 8 MONTHS, ABLE TO ENGAGE IN RECREATIONAL ACTIVITIES	NO SERIOUS IMPAIRMENT ONLY OBJECTIVE MANIFESTATION WAS SPASM AND LIMITED RANGE OF MOTION, WHICH DO NOT CONSTITUTE SERIOUS IMPAIRMENT, ABILITY TO LEAD NORMAL LIFE NOT AFFECTED
ROY V THOMAS , UNPUBLISHED OPINION DECIDED 7/31/01 (DOCKET NO. 222220)	FIBROMYALGIA, HEADACHES, NECK PAIN, DIZZINESS, MEMORY PROBLEMS	MUSCLE SPASMS, DECREASED RANGE OF MOTION, AND MULTIPLE "TRIGGER POINTS"	MEDICATION, PHYSICAL THERAPY, TRIGGER POINT INJECTIONS FOR OVER 2 YEARS	STOPPED BOWLING, SWIMMING, EXTENDED MOTORCYCLE TRIPS AND MINIMIZED HOUSEHOLD TASKS AND GARDENING. CURTAILED DAYCARE BUSINESS	AFFIRMED JURY VERDICT FOR PLAINTIFF . EVIDENCE CREATED FACTUAL QUESTION FOR JURY AND SUPPORTED FINDING OF SERIOUS IMPAIRMENT

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>SALIM V BUCHANAN</i> UNPUBLISHED OPINION DECIDED 1/22/02 DOCKET NO. 224338	TMJ		NON-COMPLIANCE WITH MOUTH APPLIANCE	COULD ONLY PERFORM SPORADIC ODD JOBS DUT TO PAIN, FATIGUE	NO SERIOUS IMPAIRMENT JURY VERDICT CONFLICTING MEDICAL OPINIONS, PL'S TESTIMONY EVASIVE AND INCONSISTENT. VERDICT NOT AGAINST WEIGHT OF EVIDENCE
<i>SANDERS V CANTIN</i> UNPUBLISHED 240065 (9/16/03)	SMALL FINGER FRACTURE (BOXER'S FRACTURE) ABDOMINAL SCAR	YES	NORMAL TREATMENT WITHOUT COMPLICATIONS	OFF WORK 6 WEEKS, NO HOUSEHOLD CHORES 2 WEEKS, GOOD RECOVERY, OCCASIONAL PAIN, DECREASED GRIP WHEN TUBING	NO SERIOUS IMPAIRMENT , NO EFFECT ON ABILITY TO LEAD NORMAL LIFE. 6 INCH SCAR ON ABDOMEN WAS PERMANENT SERIOUS DISFIGUREMENT
<i>SCHWARTZENFELD V RAUPP</i> , UNPUBLISHED OPINION DOCKET NO. 237449, DECIDED 11/26/02	THUMB AND SHOULDER	NOT DISCUSSED EXCEPT MINOR SCAR ON SHOULDER	NOT DISCUSSED	ABLE TO PERFORM SAME TYPE AND QUANTITY OF SURGERY AFTER ACCIDENT, ONLY TEMPORARY DISRUPTION OF SOCIAL LIFE, BICYCLING AND GOLF ACTIVITIES	NO SERIOUS IMPAIRMENT NO EVIDENCE THAT GENERAL ABILITY TO LEAD NORMAL LIFE WAS SIGNIFICANTLY ALTERED. SCAR WAS NOT PERMANENT SERIOUS DISFIGUREMENT. PL FAILED TO MEET THRESHOLD REQUIREMENTS
<i>SCIATTO V WALKER</i> UNPUBLISHED OPINION DOCKET NO. 236456 DECIDED 12/27/02	HERNIATED DISC AT T1-T2, CERVICAL STRAIN, MUSCLE SPASMS, UPPER BACK AND NECK PAIN	MRI REVEALED HERNIATED DISC	PHYSICAL THERAPY, CHIROPRACTIC	MISSED ONE DAY OF WORK, HAD TO HIRE 2 MEN TO HELP WITH SIDE REMODELING BUSINESS, UNABLE TO BOWL, RIDE ROLLER COASTERS AND ROUGHHOUSE WITH NEPHEWS	NO SERIOUS IMPAIRMENT , NO EVIDENCE THAT HERNIATED DISC WAS RELATED TO PAIN SYMPTOMS, ONLY PARTICIPATED IN BOWLING 2-3 TIMES A YEAR PRIOR TO THE ACCIDENT AND COULD STILL ROUGHHOUSE, JUST NOT FOR AS LONG AS BEFORE ACCIDENT.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>SEELEY V HOWARD</i> UNPUBLISHED DOCKET NO. 238626 (2/14/03)	NON-DISPLACED FRACTURED STERNUM, BRUISED KNEE, DEGENERATIVE SUBTALAR JOINT DISEASE OF ANKLE, FRACTURED HIP	YES	NO TREATMENT FOR STERNUM FRACTURE, TOOK 6 WEEKS TO HEAL, SUBTALAR FUSION FOR ANKLE INJURY AND ORIF FOR HIP FRACTURE	NOT DISCUSSED	NO SERIOUS IMPAIRMENT FOR STERNUM FRACTURE OR KNEE BRUISE. SERIOUS IMPAIRMENT FOR ANKLE INJURY AND HIP FRACTURE, BUT NOT RELATED TO AUTO ACCIDENT, ANKLE INJURY NOT DIAGNOSED TIL 18 MONTHS AFTER ACCIDENT, & HIP FX RELATED TO ANKLE INJURY. DR'S TESTIMONY REGARDING CAUSATION SPECULATIVE.
<i>SHIVELY V BOGIAS,</i> UNPUBLISHED OPINION DOCKET NO. 237052 (11/26/02)	MILD HERNIATED DISC IN NECK	YES	NOT DISCUSSED	NO HOBBIES BEFORE ACCIDENT, BUT MISSED 3 PERIODS OF WORK FOR 6 WEEKS TO 8 MONTHS AT A TIME.	QUESTION OF FACT, SD REVERSED PLAINTIFF'S INABILITY TO PERFORM HIS PRIMARY FUNCTION IN LIFE, WORK, RASIED THE QUESTION OF WHETHER THE IMPAIRMENT AFFECTED HIS GENERAL ABILITY TO LEAD A NORMAL LIFE.
<i>SIMMONS V HAYES,</i> UNPUBLISHED DOCKET NO. 244583 (4/10/03)	PRE-EXISTING DISABILITY. CURRENT INJURIES NOT DISCUSSED	NOT DISCUSSED	NOT DISCUSSED	PREVIOUSLY DISABLED FROM EMPLOYMENT, LIMITED IN WALKING, HUNTING, FISHING, & CHORES	NO SERIOUS IMPAIRMENT, NO EVIDENCE THAT LIMITATIONS WERE RELATED TO AUTO ACCIDENT INJURIES.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
SMITH V TOWNSEND UNPUBLISHED OPINION DECIDED 11/12/02 DOCKET NO. 234446	LACERATION RIGHT EYE, RIGHT ORBITAL WALL FRACTURE, 2 RIB FRACTURES, TEMPORARY URINARY INCONTINENCE, BACK PAIN	YES, 2 DISC PROTRUSIONS SEEN ON MRI	SUTURES FOR LACERATION, SMALL AMOUNT OF TREATMENT FOR BACK	UNABLE TO CONTINUE WORK AS A CARPENTER AND RESTRICTED LEISURE ACTIVITIES	NO SERIOUS IMPAIRMENT , OBJECTIVELY MANIFESTED INJURIES HEALED QUICKLY. BACK PAIN DID NOT START FOR 10 MONTHS AFTER ACCIDENT, PLAINTIFF'S PATTERN OF SPORADIC WORK DID NOT CHANGE AND WAS ABLE TO HUNT AND FISH. ABILITY TO LEAD NORMAL LIFE NOT SIGNIFICANTLY ALTERED.
SPAGNUOLO V DORN UNPUBLISHED OPINION DECIDED 12/14/01 DOCKET NO. 225535	TMJ, FREQUENT HEADACHES	NOT DISCUSSED	PRESCRIPTION AND OVER-THE- COUNTER IBUPROFEN, MOIST HEAT TREATMENTS, BITE SPLINT	ATE SOFTER FOODS, WAS ABLE TO WORK FULL TIME SINCE THE ACCIDENT	NO SERIOUS IMPAIRMENT IF PAIN AND DISCOMFORT DO NOT INCAPACITATE PLAINTIFF OR SIGNIFICANTLY CHANGE LIFESTYLE, NO SERIOUS IMPAIRMENT AS A MATTER OF LAW.
SPIES V PARKER UNPUBLISHED OPINION DECIDED 6/25/02 DOCKET NO. 227581	COMMINUTED FRACTURE OF LEFT ULNA, 7 INCH SCAR ON FOREARM	YES	TWO SURGERIES, CASTED SEVERAL WEEKS, PAIN MEDICATION	MISSED WORK RIGHT AFTER ACCIDENT, MISSED SEVERAL WEEKS OF SCHOOL DUE TO MEDICATION, ABLE TO RESUME ACTIVITIES EXCEPT FOR CERTAIN SPORTS, LOSS OF 7-15 DEGREE PRONATION IN LEFT ARM, OCCASIONAL PAIN.	NO SERIOUS IMPAIRMENT INJURY PREVENTED PLAINTIFF FROM PERFORMING NORMAL ACTIVITIES ONLY FOR A FEW WEEKS, GENERAL ABILITY TO LIVE NORMAL LIFE NOT AFFECTED. NO SERIOUS IMPAIRMENT AS A MATTER OF LAW. ALTHOUGH COURT AFFIRMED JURY'S VERDICT OF NSI, NO PERMANENT SERIOUS DISFIGUREMENT EITHER.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>SPIVACK V KOEPPEN</i> UNPUBLISHED OPINION DECIDED 6/25/02 DOCKET NO. 229408	NECK	YES	NO TREATMENT UNTIL SUBSEQUENT INJURY IN KARATE CLASS	MISSED 2-3 DAYS OF WORK, REFRAINED FROM PHYSICAL ACTIVITY FOR 1 WEEK, RETURNED TO ACTIVE LIFE OF WORK, TRAVEL, EXERCISE, KARATE WITHIN 2 WEEKS, COMPLAINED OF HAVING TO ALTERNATE SWIMMING STROKES, PAIN IN NECK WHILE DRIVING OR SITTING FOR LONG PERIODS	NO SERIOUS IMPAIRMENT, REVERSED JURY VERDICT FOR PLAINTIFF AND REMANDED FOR DV FOR DEFENDANT. SOME ACTIVITIES CHANGED BUT CHANGES WERE NOT SEVERE ENOUGH TO PREVENT PLAINTIFF FROM LIVING A NORMAL LIFE. ABILITY TO LEAD NORMAL LIFE NOT SIGNIFICANTLY ALTERED.
<i>STARKS V STOCKDALE,</i> UNPUBLISHED OPINION, DECIDED 10/1/99 (DOCKET NO. 212901)	CERVICAL STRAIN, PARESTHESIAS OF RIGHT THUMB AND INDEX FINGER	XRAYS - MILD SPURRING AND DISC SPACE NARROWING, EMG NEGATIVE	CHIROPRACTIC		NO SERIOUS IMPAIRMENT, NO EVIDENCE THAT AGGRAVATION WAS SIBF.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>STEPHENS V HALAMA</i> UNPUBLISHED OPINION DOCKET NO. 228078 DECIDED 2/26/02	NECK AND UPPER BACK STRAIN	NO, XRAY'S NEGATIVE		INCREASED PAIN	NO SERIOUS IMPAIRMENT HAD SERIOUS IMPAIRMENT FROM FIRST ACCIDENT. FAILED TO INTRODUCE OBJECTIVE MANIFESTATION THAT INJURIES HAD WORSENERD BECAUSE OF SECOND ACCIDENT. NO SERIOUS IMPAIRMENT AS TO SECOND ACCIDENT.
<i>STRAUB V COLLETTE</i> ____ MICH APP ____ DOCKET NO. 236505 DECIDED 12/20/02 This opinion was VACATED by the Supreme Court 6/12/03	FRACTURE LEFT FIFTH METACARPAL "BOXER'S FRACTURE"	YES	OUTPATIENT SURGERY, PHYSICAL THERAPY, CASTED FOR A TIME	OFF WORK FROM 3 MONTHS, UNABLE TO PLAY BASS GUITAR 4 MONTHS	SERIOUS IMPAIRMENT, AS A MATTER OF LAW, INJURY AFFECTED PLAINTIFF'S ABILITY TO LEAD HIS NORMAL LIFE, ALBEIT FOR A SHORT TIME, SINCE PERFORMING MUSICALLY AND WORKING WERE INTEGRAL PARTS OF HIS NORMAL LIFE. INJURY NEED NOT BE PERMANENT TO BE SERIOUS IMPAIRMENT.
<i>STRAUB V COLLETTE</i> <i>(ON REMAND)</i> ____ MICH APP ____ (9/16/03) 236505	FRACTURE LEFT FIFTH METACARPAL "BOXER'S FRACTURE"	YES	OUTPATIENT SURGERY, PHYSICAL THERAPY, CASTED FOR A TIME	OFF WORK FROM 3 MONTHS, UNABLE TO PLAY BASS GUITAR 4 MONTHS	SERIOUS IMPAIRMENT AS A MATTER OF LAW, INJURY AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD HIS NORMAL LIFE. WORK AND PLAYING MUSIC WERE INTEGRAL PARTS OF PLAINTIFF'S LIFE.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>THALJI V DETROIT EDISON & GREEN</i> UNPUBLISHED OPINION DOCKET NO. 226426 DECIDED 3/26/02	DISC BULGE IN LOWER BACK, CENTRAL DISC DISPLACEMENT IN NECK, POSITIVE EMG, CONCUSSION	YES	2 YEARS MEDICAL TREATMENT	OFF WORK 10 WEEKS, LIMITED JOB PERFORMANCE DUE TO INJURIES, UNABLE TO JOG, PLAY TENNIS OR PLAY WITH CHILDREN	SERIOUS IMPAIRMENT PER JURY COURT OF APPEALS HELD QUESTION OF FACT. THERE WAS EVIDENCE OF AN OBJECTIVE INJURY THAT AFFECTED GENERAL ABILITY TO LEAD NORMAL LIFE. AFFIRMED DENIAL OF DIRECTED VERDICT FOR DEFENDANT
<i>THOMAS V SISTRUNK,</i> UNPUBLISHED OPINION DOCKET NO. 234847, DECIDED 5/20/03	KNEE PAIN, SWELLING, JOINT EFFUSION, CREPITATION, PRE- EXISTING	NOT DISCUSSED	NOT DISCUSSED	NOT DISCUSSED	NO SERIOUS IMPAIRMENT, PLAINTIFF'S DOCTOR COULD NOT DEFINITELY ATTRIBUTE KNEE CONDITION TO THE ACCIDENT, CONCLUDING THAT ARTHRITIS WAS MOST LIKELY THE CAUSE. A DOCTOR MUST INDICATE THE DEGREE OF INJURY TO SATISFY THE THRESHOLD.
<i>TOLBERT V ISHAM,</i> UNPUBLISHED DOCKET NO. 231424 (5/29/03)	SMALL PARTIAL TEAR OF MUSCLE TENDON OF SHOULDER	YES	NOT DISCUSSED	UNABLE TO PERFORM HOUSEHOLD CHORES OR WORK SINCE PREVIOUS 1993 ACCIDENT. DAILY ROUTINE DID NOT CHANGE AFTER 1996 ACCIDENT.	NO SERIOUS IMPAIRMENT. OBJECTIVE SHOULDER INJURY, BUT PLAINTIFF FAILED TO DEMONSTRATE THAT ANY ASPECT OF HER DAY TO DAY ACTIVITIES WAS AFFECTED. GENERAL ABILITY TO LEAD NORMAL LIFE NOT SIGNIFICANTLY ALTERED BY INJURY.

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>VATAY V MACOMB COUNTY SHERIFF'S DEPT & WRIGHT</i> UNPUBLISHED OPINION DOCKET NO. 227533 DECIDED (3/1/02)	FRACTURED BONES, MILD DISC BULGES IN SPINE, BACK STRAIN		FRACTURES SPLINTED AND HEALED, BACK STRAIN TREATED WITHOUT SURGERY, DISC BULGES DID NOT REQUIRE TREATMENT	SHORT LIVED DISABILITY, PAIN OR RESIDUAL IMPAIRMENT NOT DUE TO PLAINTIFF'S PHYSICAL INJURIES	NO SERIOUS IMPAIRMENT VARIETY OF INJURIES, NONE SERIOUSLY AFFECTED LIFESTYLE. PLAINTIFF FAILED TO SHOW AN OBJECTIVELY MANIFESTED IMPAIRMENT OF AN IMPORTANT BODY FUNCTION WHICH AFFECTED HER GENERAL ABILITY TO LEAD HER NORMAL LIFE.
<i>WALLER V CONTINENTAL INS.</i> UNPUBLISHED DOCKET NO. 234323 (11/22/02)	CERVICAL, THORACIC AND LUMBAR FIBROMYOSITIS, RIGHT KNEE ARTHRITIS, SPASM	SPASM OBJECTIVE IMPAIRMENT	ER & DR. LEWERENZ	NOT DISCUSSED	SD FOR DEFENDANT REVERSED, QUESTION OF FACT WHETHER PLAINTIFF SUSTAINED OBJECTIVE IMPAIRMENT/INJURY
<i>WASHINGTON V REYNOLDS,</i> UNPUBLISHED DOCKET NO. 237537 (2/18/03)	CERVICAL, THORACIC, LUMBAR SPRAIN, POSSIBLE DISC PROTUSION AND SPINAL STENOSIS	NO, JUST PAIN AND TENDERNESS, EMG AND CT SCAN NORMAL	ER, WENDY MILLER, MD, R. STEWART ROBERTSON, MD, PT, JEFFERY FISCHGRUND, MD, MSHIN AL-RAWI, MD, & 3 IME'S	TESTIFIED UNABLE TO PLAY WITH CHILDREN, RIDE BIKE, GROCERY SHOP, ONE DOCTOR DISABLED HER FROM WORK FROM 3/12/03 TO 6/28/01.	NO SERIOUS IMPAIRMENT. AMENDMENTS TO 3135 DID NOT OVERTURN DIFRANCO REGARDING "OBJECTIVELY MANIFESTED" INJURY REQUIREMENT. MUST BE A MEDICALLY IDENTIFIABLE INJURY OR CONDITION WITH A PHYSICAL BASIS. PLAINTIFF DID NOT MEET THRESHOLD FOR MEDICALLY IDENTIFIABLE INJURY, ONLY GENERAL ACHES AND PAINS.
<i>WEISER V REED,</i> UNPUBLISHED OPINION DOCKET NO. 236968, DECIDED 11/26/02	SEVERAL FRACTURED TEETH, INTENSE HEADACHES	YES	NOT DISCUSSED	ABILITY TO EAT AFFECTED. HEADACHES INCAPACITATING PER PLAINTIFF	NO SERIOUS IMPAIRMENT NO EVIDENCE THAT IMPAIRMENT WAS SERIOUS, I.E. SIGNIFICANTLY AFFECTED HIS NORMAL LIFE

CASE NAME	INJURY ALLEGED	OBJECTIVELY MANIFESTED NATURE OF INJURY	TREATMENT	AFFECT ON GENERAL ABILITY TO LEAD NORMAL LIFE EXTENT OF INJURY	COURT HELD
<i>WERTHEIMER V WALKER</i> UNPUBLISHED DOCKET NO 238686 (4/15/03)	NECK AND SHOULDER	YES, MUSCLE SPASMS, DISC SPACE NARROWING AND DISC BULGES ON MRI	MEDICATION AND PHYSICAL THERAPY	OFF WORK TEN MONTHS, DIFFICULTY WITH HOUSEWORK AND YARDWORK	QUESTION OF FACT, REVERSED SD FOR DEFENDANT. ONE DOCTOR TESTIFIED THAT PLAINTIFF WAS NORMAL EXCEPT FOR UNEXPLAINED PAIN, YET COURT HELD THAT BEING DISABLED FROM WORK FOR 10 MONTHS AND DIFFICULTY WITH HOUSEWORK CREATED QUESTION OF FACT WHETHER INJURIES WERE SERIOUS.
<i>WHITE V WIER</i> UNPUBLISHED DOCKET NO. 236000 (2/21/03)	NON-DISPLACED FRACTURED STERNUM	YES	NOT DISCUSSED	ABLE TO WORK AS A BARMAID, TAKE CARE OF CHILDREN AND TAKE A VACATION. PLAINTIFF AFFIDAVIT CLAIMED UNABLE TO SIT OR STAND FOR 6 WEEKS, UNABLE TO LIFT CHILDREN FOR 6 MONTHS, UNABLE TO WORK	QUESTION OF FACT ESTABLISHED BY PLAINTIFF'S AFFIDAVIT REGARDING WHETHER NORMAL LIFE AFFECTED. MEDICAL RECORDS RELIED ON BY DEFENDANT WERE UNAUTHENTICATED INADMISSIBLE HEARSAY.
<i>YELIZAROV V STYLES</i> UNPUBLISHED OPINION DOCKET NO. 239740 (12/13/02)	HEADACHES, NECK & ARM PAIN	ASSUMED	NOT DISCUSSED	MISSED ONE DAY OF WORK, ABLE TO WORK 40 HOURS PER WEEK AS AN ACCOUNTANT, ABLE TO COOK, CLEAN, NEEDED ASSISTANCE WITH SOME CHORES, DIFFICULTY WITH RECREATIONAL READING, ABLE TO VACATION AND GO SWIMMING	NO SERIOUS IMPAIRMENT, MINOR LIFESTYLE CHANGES DID NOT ESTABLISH ABILITY TO LEAD NORMAL LIFE SIGNIFICANTLY ALTERED.



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NO-FAULT TORT THRESHOLD

House Bill 4341 as enrolled
Public Act 222 of 1995
Second Analysis (12-18-95)

Sponsor: Rep. Harold S. Voorhees
House Committee: Insurance
Senate Committee: Financial Services

THE APPARENT PROBLEM:

Under Michigan's no-fault auto insurance system, motorists look to their own insurance policies for benefits (such as medical treatment and lost wages) in case of accidents and injuries and can only sue another motorist in extraordinary circumstances. The promise of no-fault insurance is that by giving up the traditional right to sue, claims will be settled more predictably and without as much dispute and delay, compensation will more closely match losses, and more of the customers' premium dollars will be spent on the payment of claims and less on administration costs and transaction costs, such as legal fees. It is still possible to sue a negligent driver under most no-fault systems when injuries go beyond a certain "threshold", expressed either in a dollar amount or in a "verbal" description.

Michigan's statute contains a verbal threshold for non-economic damages. (Additionally, people can sue for intentionally caused harm; for allowable expenses, work loss, and survivor's loss beyond those covered by no-fault insurance; and for damages to motor vehicles not covered by insurance, up to \$400.) Lawsuits are only permitted for non-economic (e.g., "pain and suffering") losses in case of "death, serious impairment of body function, or permanent serious disfigurement." The phrase "serious impairment of body function" has been interpreted twice in decisions of the Michigan Supreme Court, the second decision more or less repudiating the first. In 1982, in what is called the Cassidy decision, the court said basically that whether the "serious impairment of body function" threshold had been met in a given case was a matter of statutory construction for a trial court (i.e., a judge not a jury) to decide. It also said that the phrase referred to "important" body functions. The court also held that an injury should be "objectively manifested" (e.g., by x-ray). The Cassidy court's ruling said the legislature had not intended to raise two significant obstacles to lawsuits (death and permanent serious disfigurement) and one quite insignificant one, and so a restrictive definition of "serious impairment of body function" was appropriate. Nor, the court said, had the legislature

intended that the threshold vary jury by jury or community by community.

However, in 1986, in the DiFranco ruling, the court rejected its earlier decision (the membership was not the same). It put the question of whether a person had suffered a serious impairment of body function in the hands of the "trier of fact" (i.e., a jury or judge sitting without a jury) whenever reasonable minds could differ as to the answer. The court said the threshold is "a significant, but not extraordinarily high, obstacle" to recovering damages and that "the impairment need not be of the entire body function or of an important body function", and "need not be permanent." This decision has governed the application of the tort threshold since then. Insurance companies and some others have portrayed this decision as an unwarranted liberalization of the no-fault law that has led to increased litigation and increased costs to the insurance system, thus contributing to higher premiums for insurance consumers. Amendments to the no-fault statute that would return to a tort threshold resembling that provided by the Cassidy ruling were key elements of the two comprehensive reform proposals (which dealt with a great many other issues, as well) defeated at the polls in 1992 and 1994 and have been introduced again, this time standing alone.

THE CONTENT OF THE BILL:

Michigan's no-fault automobile insurance system only permits lawsuits for non-economic losses ("pain and suffering") when a certain threshold of injury has been met. The Insurance Code says that a person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement." The expression "serious impairment of body function" is not currently further defined in statute, but its meaning is governed by a state supreme court ruling. House Bill 4341 would put a more restrictive definition in statute by specifying that

House Bill 4341 (12-18-95)

"serious impairment of body function" means "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The bill also would specify that the following provisions would apply to a lawsuit for non-economic damages.

— The issues of whether an injured person had suffered serious impairment of body function or permanent serious disfigurement would be questions of law for the court (i.e., issues for a judge to decide rather than, as now, a jury) if the court found either of the following.

* There was no factual dispute concerning the nature and extent of the person's injuries.

* There was a factual dispute concerning the nature and extent of the person's injuries, but the dispute was not material to the determination as to whether the person had suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury would be created if a licensed allopathic or osteopathic physician who regularly diagnosed or treated closed-head injuries testified under oath that there a serious neurological injury could exist.

— Damages could not be assessed in favor of a party who was more than 50 percent at fault.

— Damages could not be assessed in favor of a party who was operating his or her own vehicle at the time of the injury and did not carry required insurance coverage on the vehicle.

The bill would apply to causes of action for damages filed on or after 120 days after the effective date of the bill.

The bill also would expand the current "mini-tort" exception to the limitation on lawsuits. Under the no-fault act, a person is liable for damages to a motor vehicle up to \$400, to the extent that the damages were not covered by insurance. (This means a person can recover the amount of a deductible, up to \$400, from a person who damages his or her motor vehicle.) The bill would raise the amount of damages that can be recovered to \$500.

MCL 500.3135

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has said that the impact on

state and local units of government is indeterminate. The agency notes that the cost to the state of losses under the no-fault auto insurance law (in amounts paid and reserves) was \$3.2 million in fiscal year 1992-93 and \$3.1 million in fiscal year 1993-94, and that "to the extent that this bill would limit exposure, there are potential savings." (SFA floor analysis dated 5-24-95)

ARGUMENTS:

For:

Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits for non-economic ("pain and suffering") damages was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision. That means making the determination of whether the threshold for a lawsuit has been met a question of law for a judge to decide and not for a jury. And it means that the term "serious impairment of body function" would once again refer to "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life" (emphasis added). Together, these provisions will work toward ensuring that the cases that go forward are deserving of a hearing before a jury. The undeserving and frivolous cases will be weeded out.

Other provisions will help to accomplish this as well. The bill would prevent those who are more than 50 percent at fault in an accident from being able to collect damages from other parties. It is an absurdity that a driver who shoulders the majority of the blame for an accident is able to successfully sue others for his or her "pain and suffering." It should be kept in mind that the state moved to a comparative negligence system (where damages are based on share of fault) from a contributory negligence system in 1979, after no-fault was enacted. Under the old system, proponents say, at-fault parties could not collect. It is also unjust that an uninsured driver — who does not contribute to the no-fault insurance system — can sue for non-economic damages to be paid out by the insurance company of a person who is contributing to the system. The bill would no longer permit that.

To the extent that these provisions would reduce the number of lawsuits and the amount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance

marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for more people. Proponents of this bill say that there was more than a 100 percent increase in insurance lawsuits from 1986 to 1994, the years of the relaxed standards for lawsuits, whereas lawsuits declined by over 40 percent from 1982 to 1986, the years governed by the standards of the prior supreme court decision (to which this bill would return). The combination of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system; it will become unaffordable to ever more insurance customers.

Several points can be made about the features of this bill, based in part on the reasoning of the 1982 supreme court decision on how the term "serious impairment of body function" should be applied.

— Putting the determination of whether the threshold has been met into the hands of the judge (as a matter of law) makes sense for several reasons. It will reduce the number of jury trials, which otherwise would be needed to make the determination, and reducing litigation is a goal of no-fault. It will produce more uniformity in decisions by allowing judges to construct the statute rather than juries, which are more likely to vary in attitude based on geography or even one jury to the next. Further, the phrase in question is not commonly used, so juries are not likely to have a clear sense of its meaning. Putting these matters before a judge also reduces defense costs and reduces the stress of being sued for defendants.

— The expression "serious impairment of body function" must be understood in connection with the other tort thresholds, death and permanent serious disfigurement. These are high standards. It is not sensible to impose two tough barriers to lawsuits and one porous one. The expression cannot be allowed to refer to just any body function nor can it mean all body function or entire body functioning. The middle ground is to require that an important body function be impaired. Further, it should apply to the effect of the impairment on an injured person's general ability to live a normal life and not to injuries that do not have such an impact.

— There ought to be some objective manifestation of the injuries being claimed in order to determine the basis for the alleged impairment before a plaintiff can present the story of his or her "pain and suffering" to a jury. It should be noted that the bill would allow head injury cases to go to a jury if a physician with experience with such injuries testifies under oath that a serious neurological injury may be present.

Against:

Virtually the same provisions contained in this bill were part of the auto insurance proposals resoundingly defeated at referendum both in 1992 and 1994. The advertising campaign for the 1994 proposal prominently featured the restriction on lawsuits, as well as focusing on the promised 16 percent rate cut. Voters rejected this. Why is it back before the legislature again? Further, the language contained in the bill echoes an earlier interpretation of the statute that was firmly repudiated in 1986 by the Michigan Supreme Court. The court declared that both the requirement that injuries be "objectively manifested" (as that term had been subsequently refined in an appeals court case) and that the injury must interfere with a person's "general ability to live a normal life" constituted "insurmountable" obstacles to recovering non-economic damages. Does it make sense to return to this stringent threshold rejected by both the supreme court and the state's voters? Does it make sense to erect this high barrier to lawsuits, depriving seriously injured auto accident victims of their opportunity to present their case to a jury of peers, particularly since there is no guarantee that any savings to insurance companies will be returned to customers in the form of rate reductions? (What, in fact, are the savings likely to be, given that the cost of these lawsuits is a minor portion of the insurance premium?)

Contrary to the arguments of the insurance companies, the current threshold is a relatively stiff one. Reportedly, Michigan is next to last in bodily injury claims in proportion to property damage. It is one of the most difficult states in which to bring an auto-related lawsuit. Indeed, if there is a lawsuit problem, it is because of the number of suits filed against insurance companies to make them provide the first-party benefits to which policyholders are entitled under their policies. People sometimes have to fight to get these benefits. It should be noted that the language of the tort threshold provisions in the no-fault statute has not changed since the law took effect in 1973. The bill does not, as is sometimes said, restore the original intent of the law. If anything, the 1986 DiFranco decision that this bill would overturn did that. The 1982 Cassidy decision could be called the aberration (contradicting as it did an advisory opinion issued by an earlier supreme court before the no-fault statute took effect).

The following points can be made regarding the elements of the bill.

— Taking the threshold determination away from juries is unwarranted. It denies plaintiffs the right to present their case to a jury of peers. In the past, a

representative of trial judges has opposed this as an ineffective use of judicial resources, as likely to give rise to more appeals of threshold determinations, and as a potential source of litigation over the constitutionality of this portion of the no-fault law. In the DiFranco case, the state supreme court said, regarding the experience under the Cassidy standards, that the courts "have proven to be no more consistent than juries" in determining the threshold question. The court said that "properly instructed juries are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether the impairment was serious."

-- The requirement that an injury be "objectively manifested" could unfairly penalize accident victims with serious injuries that are not subject to medical measurement.

-- Preventing a person more than 50 percent at fault from collecting damages sounds sensible. But it ignores the fact that the determination of fault is not an exact science. Accidents are often not investigated properly or thoroughly. Mistakes are made and often not corrected. If at-fault drivers are to be penalized, the percentage of fault should be much higher (perhaps 80 percent) to eliminate the gray areas. By some estimates, only one-quarter of cases brought now feature drivers 100 percent at fault. The bill's limitation means a person catastrophically injured in an auto accident by a (more or less) equally at-fault driver would be unable to collect non-economic damages. An alternative approach might be to prevent someone who was both more than 50 percent at fault and convicted of drunk driving from being able to sue.

-- Similarly, an uninsured person could not collect. Is it fair that a 20-year-old whose life is ruined by a drunk driver, for example, should be completely foreclosed from collecting damages because he or she did not carry mandatory auto insurance? Many uninsured drivers do not carry insurance because they cannot afford it, not because they want to flout the law.

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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